



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

**Mamatta and Minister for Immigration, Citizenship and Multicultural Affairs
(Migration) [2023] AATA 133 (10 February 2023)**

Division: GENERAL DIVISION

File Number: **2021/7424**

Re: **Ila Junior Mamatta**

APPLICANT

And **Minister for Immigration, Citizenship and Multicultural Affairs**

RESPONDENT

DECISION

Tribunal: **Senior Member Theodore Tavoularis**

Date: **10 February 2023**

Place: **Brisbane**

1. Pursuant to section 43(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **affirms** the decision made by the delegate of the Respondent, dated 11 October 2021 not to revoke the mandatory cancellation of the Applicant's Class TU Subclass 500 Student visa.

.....[SGD].....

Senior Member Theodore Tavoularis

Catchwords

MIGRATION – Non-revocation of mandatory cancellation of a Class TU Subclass 500 Student Visa – where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – Applicant voluntarily left Australia- visa in question of a time-limited nature - Utility of Ministerial Direction No 90- consideration of Ministerial Direction No. 90 – decision under review affirmed

Legislation

Acts Interpretation Act (1901) (Cth)

Administrative Appeals Tribunal Act 1975 (Cth)

Family Law Act 1975 (Cth)

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth)

Cases

Bartlett and Minister for Immigration and Border Protection (Migration) [2017] AATA 1571

Jagroop and Minister for Immigration and Border Protection (2016) 241 FCR 461

Plaintiff M1 v Minister for Home Affairs (2022) 400 ALR 417

Secondary Materials

Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (15 April 2021)

REASONS FOR DECISION

Senior Member Theodore Tavoularis

10 February 2023

INTRODUCTION AND BACKGROUND

2. Ila Junior Mamatta ('the Applicant') is a 25-year-old male, born in Papua New Guinea ('PNG') in July 1997. By a decision dated 11 October 2021 a delegate of the Minister for Minister for Immigration, Citizenship and Multicultural Affairs ('the Minister' or 'the Respondent') refused to revoke the mandatory cancellation of the Applicant's Class TU Subclass 500 Student Visa ('the visa'). This refusal to revoke decision was made pursuant to s 501CA(4) of the *Migration Act 1958* (Cth) ('the Act').
3. The Applicant's visa was mandatorily cancelled by the Respondent pursuant to s 501(3A) of the Act as a result of the imposition of an 18 month custodial term of imprisonment.¹ For offending charged under specific sections of the Queensland Criminal Code Act 1899 (Qld) ('the Criminal Code'). The Applicant's criminal history in Australia can be summarised as follows:²

Court	Date	Offence	Result
Brisbane Magistrates Court	23/02/2021	Common assault	Conviction recorded Sentenced imprisonment: 4MO To be suspended for: 9MO
		Contravention of domestic violence order Possess utensils or pipes etc that had been used Possessing dangerous drugs Contravention of domestic violence order Breach of bail conditions	Concurrent on all charges Conviction recorded Not further punished
Brisbane District Court	02/11/2020	Choking suffocation strangulation domestic relationship – domestic violence offence	Conviction recorded Sentenced imprisonment: 2Y 6MO To be suspended for: 3Y after serving: 6MO

¹ R2, G27.

² R2, G4.

		Assaults occasioning bodily harm – domestic violence offence	On all charges conviction recorded Sentenced imprisonment: 18MO To be suspended for: 3Y after serving: 6MO
		Common assault domestic violence offence	Conviction recorded Sentenced imprisonment: 6MO all terms of imprisonment to be served concurrently declare that time spent in pre-sentence custody be deemed as time already served under this sentence: 30 DAYS
Brisbane Magistrates Court	31/08/2020	Breach of bail condition Contravention of domestic violence order	On all charges no conviction recorded recognisance: \$100.00 good behaviour period: 12MO
Brisbane Magistrates Court	12/09/2019	Wilful damage	No conviction recorded Fined: \$200.00 Time to pay: 28D Recognisance: \$450.00 Good behaviour period: 9MO Restitution: \$600.00 Time to pay: 1MO

5. On 19 November 2020 while the Applicant was serving the abovementioned sentence of 18 months, a delegate of the Respondent Minister mandatorily cancelled his visa because he did not pass the character test as he was serving a full-time custodial sentence. This mandatory cancellation decision was made pursuant to s 501(3A) of the Act.
6. On 17 December 2020 the Applicant made written representations to the Respondent requesting revocation of the cancellation of his visa ('revocation request').
7. On 11 October 2021 the delegate of the Respondent decided, pursuant to s 501CA(4) of the Act, not to revoke the mandatory cancellation decision made on 19 November 2020.
8. On 12 October 2021 the Applicant lodged an application in this Tribunal for review of the abovementioned refusal to revoke decision made on 11 October 2021. That application

was ventilated in this Tribunal on 7 and 8 December 2021. This Tribunal (differently constituted) made its decision in relation to the first-ventilated application on 3 January 2022.

9. There followed an appeal by the Applicant to the Federal Court of Australia for judicial review of the Tribunal's decision of 3 January 2022. This decision of the Tribunal was, via the issue of constitution writs of certiorari and mandamus, quashed by the Federal Court on 1 June 2022. The Federal Court (per His Honour Justice Logan) directed this Tribunal to re-determine the Applicant's application for review according to law. This Tribunal has jurisdiction to review the refusal to revoke decision³ pursuant to s 500(1)(ba) of the Act.
10. The Applicant has arrived in and departed from Australia on multiple occasions.⁴ For present purposes it suffices to say that his offending in this country has caused him to be removed from the Australian community since October 2019. Following is a chronological list of events relevant to this review application:⁵

the Applicant went into criminal custody for the period 8 October 2019 to 6 November 2019;

the Applicant was then granted bail;⁶

on 2 November 2020, the Applicant was sentenced at the Brisbane District Court;⁷

on 2 April 2021 the Applicant was released from criminal custody and immediately taken into immigration detention;

he remained in immigration detention until March 2022, whereupon he voluntarily left Australia and returned to PNG; and

at the time of the remittal Hearing before me, the Applicant remained offshore in PNG.

11. The remittal Hearing proceeded before me on 17 November 2022. The Hearing received oral evidence from the Applicant and his current partner Ms Lauren Jessi Barbara David.

³ Made pursuant to s 501CA(4) of the Act.

⁴ R2, G23.

⁵ R3.]

⁶ R2, pp.467-468.

⁷ R1, pp 35-40 – see sentencing remarks of His Honour Judge Dearden DCJ.

There was also written evidence before the Tribunal at the Hearing I conducted and, of course, at the previous ventilation of this matter in this Tribunal. The totality of that material was consolidated into an agreed Exhibit List,⁸ a true and correct copy of which is attached to these Reasons and marked '**Annexure A**'.

LEGISLATIVE FRAMEWORK

12. Revocation of the mandatory cancellation of visas is governed by s 501CA(4) of the Act. Relevantly, this provides that:

The Minister may revoke the original decision if:

- (a) *the person makes representations in accordance with the invitation; and*
- (b) *the Minister is satisfied:*
 - (i) *that the person passes the character test (as defined by section 501); or*
 - (ii) *that there is another reason why the original decision should be revoked.*

13. I am satisfied that the Applicant made the representations required by s 501CA(4)(a) of the Act.⁹ Thus, the issue is whether the discretion to revoke the mandatory cancellation of the Applicant's visa may be exercised.

14. There are therefore two issues presently before the Tribunal:

- (a) whether the Applicant passes the character test; and
- (b) whether there is another reason why the decision to cancel the Applicant's visa should be revoked.

Does the Applicant pass the Character Test?

15. The parties are ad idem that the Applicant does not pass the character test. This concession was rightfully made by the Applicant's representative at the Hearing before me.¹⁰ The Respondent's representative did not seek to disturb or amend the submission

⁸ See Transcript, p 2, lines 15-38; see also Transcript, p 45, lines 18-26.

⁹ R2, G8.

¹⁰ Transcript, p 45, line 33.

about the character test put on behalf of the Respondent at the previous ventilation of that matter at this Tribunal.¹¹ Likewise, at the Hearing before me, neither party sought to challenge the finding made by the previous Tribunal that the Applicant did not pass the character test.¹²

16. A cursory review of the Applicant's criminal history clearly demonstrates that he does not pass the character test¹³ on the basis that he has acquired a '*substantial criminal record*' due to his being sentenced to at least one term of imprisonment of 12 months or more.¹⁴ He therefore does not pass the character test and cannot rely on s 501CA(4)(b)(i) of the Act for the mandatory cancellation of his visa to be revoked.

Is there another reason for the revocation of the cancellation of the Applicant's visa?

17. In considering whether to exercise the discretion in s 501CA(4) of the Act, the Tribunal is bound by s 499(2A) of the Act to comply with any directions made under the Act. In this case, *Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ('Direction' or 'Direction 90') has application.¹⁵
18. The Direction provides guidance for decision-makers on how to exercise the discretion. Relevantly, it states that:

*Informed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.*¹⁶

¹¹ R2, p 621, lines 35-38.

¹² Ibid, p 715, paras [33]-[34].

¹³ s 501(3A)(a) of the Act.

¹⁴ S 501(7)(c) of the Act.

¹⁵ Direction No 90 commenced on 15 April 2021. It replaces *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*.

¹⁶ Direction No 90, para [6]. See also Direction, para [4(1)] which provides that a, "*ecision-maker*" includes the Administrative Appeals Tribunal in making a decision under s 501 or 501CA of the Act.

The principles in paragraph 5.2

19. Paragraph 5.2 of the Direction is designed to, *'provide a framework within which decision-makers should approach their task'* under s 501 or 501CA of the Act (as the case may be). Summarised where appropriate, the principles are:
- (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia.
 - (2) Non-citizens who engage in, or have engaged in, criminal or other serious conduct should expect to be denied the privilege of coming to, or forfeit the privilege of staying in, Australia.
 - (3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they have engaged in conduct in Australia or elsewhere that raises serious character concerns (regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community).
 - (4) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age.
 - (5) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some

circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

The Primary and Other Considerations

20. Paragraphs 8 and 9 of the Direction respectively stipulate four '*Primary Considerations*', and four '*Other Considerations*' by which I must be guided in making my decision.
21. The Primary Considerations I must take into account are:
- '(1) protection of the Australian community from criminal or other serious conduct;*
 - (2) whether the conduct engaged in constituted family violence;*
 - (3) the best interests of minor children in Australia;*
 - (4) expectations of the Australian community.'*¹⁷
22. The Other Considerations which, where relevant, I must take into account, '*include but are not limited to*':
- 'a) international non-refoulement obligations;*
 - b) extent of impediments if removed;*
 - c) impact on victims;*
 - d) links to the Australian community, including:*
 - i) strength, nature and duration of ties to Australia;*
 - ii) impact on Australian business interests'*¹⁸
23. Paragraph 7 of the Direction also provides guidance as to how to take into account each Primary and Other Consideration. Briefly summarised, the Direction instructs decision-makers that:
- '(1) Information from independent and authoritative sources should be given appropriate weight;*
 - (2) Primary Considerations should "generally" be given greater weight than Other Considerations; and*
 - (3) One or more Primary Considerations may outweigh other Primary Considerations.'*
24. Prior to addressing the abovementioned Primary and Other Considerations, it is necessary to first engage with an argument put on behalf of the Applicant about whether

¹⁷Direction , para [8].

¹⁸Ibid, para [9(1)].

the Direction is of any real utility in determining whether there is *another reason* to revoke the mandatory cancellation decision pursuant to s 501CA(4)(b)(ii) of the Act.

THE *UTILITY* CONTENTION

Is the Direction of any utility?

25. The Applicant contends that the Direction is of no real utility in determining whether there is *another reason* for restoring the Applicant's visa status pursuant to s 501CA(b)(ii) of the Act. As I understood it, the gist of the *utility* contention is that the abovementioned Primary and Other constituent parts of the Direction are not relevant to the to specific circumstances of this case. This is said to be so because of certain nomenclature in the language of the Direction. In particular, it is contended that the mandatory obligation incumbent on the Tribunal to take into account the abovementioned componentry of the Direction is obviated by virtue of the words '*where relevant*'.
26. Paragraph 6 of the Direction provides as follows:
- 'Exercising discretion: Informed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision'*
27. [My emphasis].
28. The abovementioned Primary and Other Considerations are respectively found at paragraphs 8 and 9 of the Direction.
29. There seems little to cavil with the suggestion that this Tribunal should genuinely consider, and reach a conclusion about, the validity of the *utility* contention as part of its decision making rationale in the instant application.¹⁹ It is common ground that the basis of the remittal of this matter arose from the previous Tribunal's failure to:

*'...confront the necessary consequences, in terms of protection of the community and of community expectations, flowing from the expiry in any event of Mr Mamatta's student visa, even if its cancellation were revoked, and of his necessarily continuing to be in immigration detention, pending the discharge by the Minister of a statutory obligation to remove him.'*²⁰

¹⁹ See *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417 at [22] to [25] (internal reference omitted).

²⁰ G2, p 807, para [67].

30. While it may be contended by the Applicant that the previous Tribunal may have failed to deal with the case as presented to it, it does not necessarily follow that the Federal Court's remitting decision stands for the proposition that this Tribunal should disregard the Direction.
31. The Applicant says that the Direction is not relevant for two primary reasons. First, it is contended that the Direction is '...not directly relevant to engendering a state of satisfaction...that there is "another reason" why the mandatory cancellation should be revoked.' Second, it is said that 'to the extent [the principles and considerations in the Direction] are relevant, they weigh in favour of...being satisfied that there is "another reason" why the mandatory cancellation decision should be revoked.'²¹

32. Instead, a core representation is put on behalf of the Applicant in these terms:

'It would be wrong for the Tribunal to adopt an approach to this review that simply balances the primary and other considerations. So much is clear from the Federal Court's reasons for judgment. The core representation made by the applicant is, in very broad compass, that:

(a) he had a visa (subclass 500) that was always limited as to time;

(b) revocation of the mandatory cancellation would not restore him to any visa, or give him any right to enter into or remain in Australia;

(c) by reason of the immediately preceding paragraph, any principle or consideration (primary or other) that relates to protection of the Australian community or expectations that a visa ought to be cancelled in prescribed circumstances does not weigh against setting aside the mandatory cancellation;

(d) in effect, all that setting aside the mandatory cancellation would do is treat the mandatory cancellation as though it had never been made: subsection 501CA(5); and

(e) by reason of the immediately preceding paragraph, the applicant would satisfy the Special Return Criteria (in schedule 5, item 5001 of the Migration Regulation 1994 (the Regulation)) when being considered for an application for any other type of visa. As will be developed, the Minister's granting a new visa is discretionary and, still, would involve a consideration of the factors in the Direction in deciding whether to grant, or refuse to grant, any future visa under section 65 of the Migration Act.'²²

Addressing the core representation of the Applicant

33. In the following bullet points, I will address each of these elements of the core representation in turn.

²¹ A1, p 5, para [24].

²² A1, p 5, para [26].

I have difficulty in comprehending in how the time-limited nature of the Applicant's previously held student visa now militates in favour of a contention that the Direction does not apply to the instant determination. I have this difficulty for a couple of reasons. First, the Direction, at paragraph 5.2(4) makes clear reference to '*...those holding a limited stay visa...*' in the context of the extent of the Australian community's level of tolerance for serious conduct. Second, the Direction specifically contemplates a situation '*...where a non-citizen is serving a sentence of imprisonment but will not have a visa which is in effect at the end of the sentence.*' While this Tribunal is not precluded from taking into account the nature and duration of any visa in its decision making process, it does not follow that, for example, the time-limited nature of a given visa somehow obviates, in whole or in part, the ambit of the Tribunal's discretion in applying the Direction as part of determining whether there is '*another reason*' to restore the Applicant's visa status pursuant to s 501(4)(b)(ii) of the Act;

It is correct for the Applicant to say that a revocation decision by this Tribunal would have the practical effect of not restoring the Applicant's previous visa status nor would it afford him any right to enter into or remain in Australia. I have difficulty in making any safe of logical leap from that proposition to the Applicant's following proposition which suggests that any principle or consideration in the Direction relating to either or both of (1) protection of the Australian community;²³ or (2) the expectations of the Australian community²⁴ are not engaged for the purposes of the instant determination. To my mind, the fundamental difficulty with this submission is that it purports to isolate the Tribunal's assessment and application of these two Primary Considerations²⁵ to a paradigm arising immediately after publication of its decision. The language of the Direction does not impose a time-specific requirement on this assessment, but instead, requires the Tribunal to take future risk into account. For example:

nothing in the language of the chapeau to paragraph 8.1 of the Direction dealing with protection of the Australian community purports to so limit the abovementioned assessment of the Tribunal in relation to that Primary Consideration 1;

²³ Primary Consideration 1, paragraph 8(1) of the Direction.

²⁴ Primary Consideration 4, paragraph

²⁵ That is, Primary Considerations 1 and 4.

principle 5.2(5) is future-looking. It directs decision-makers to take into account the Primary and Other Considerations relevant to an individual case and further contemplates the nature of unlawful conduct to be taken into account by the Tribunal '*...if the conduct were to be repeated...*';

paragraph 8.1(2) is future-looking. It requires an assessment of the nature and seriousness of a non-citizen's conduct '*...to date...*' but goes on to direct that in assessing the recidivist risk represented by a non-citizen, the decision-maker should make an assessment about such risk '*...should the non-citizen commit further offences or engage in other serious conduct...*'

paragraph 8.1.2(1) is future-looking. It compels decision-makers – in the course of assessing recidivist risk – to have regard to the Government's view that the '*...Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases.*'

paragraphs 8.1.2(2)(a) and (b) are both future-looking. In assessing recidivist risk, it compels decision makers to look at the nature of the harm '*...should the non-citizen engage in further criminal or other serious conduct.*' In assessing the likelihood of the Applicant '*...engaging in further criminal or other serious conduct...*'. a decision-maker is directed to take into account, inter alia, information and evidence on recidivist risk and evidence of any rehabilitation undertaken by the non-citizen.

34. I am therefore satisfied that Parliament did not intend for the Direction to directly or indirectly time-limit or time-specify the period of time in respect of which the Tribunal must make an assessment about how (1) the Applicant's recidivist risk impacts the protection of the Australian community; and (2) the expectations of the Australian community referable to the Applicant's offending profile in this country. I agree with the Respondent's contention: '*the Tribunal does not have to assess risk in any particular way.*'²⁶
35. It logically follows that the assessment of (and allocation of weight to) the Direction's components relating to protection of the Australian community should encompass a non-citizen's potential for re-entering the Australian community.

²⁶ R3, p 10, para [36].

36. A similar conclusion can be reached with reference to how the Tribunal assesses (and allocates weight to) Primary Consideration 4 of the Direction comprising the expectations of the Australian community. I do not think the Direction predicates analysis of this particular Primary Consideration on a temporal basis such as when, for example, a person is in Australia. Principal 5.2(3) of the Direction makes plain that '*The Australian community expects that the Australian government can and should refuse entry to on-citizens, or cancel their visas, if they engage in conduct, in Australia or elsewhere, that raises serious character concerns.*' Cancellation of a visa is not a temporally-based exercise.
37. The language of Primary Consideration 4 itself endorses the absence of any temporally-based requirement as a pre-condition to its application. In particular, paragraph 8.4(2) of the Direction says '*...the Australian community expects that the Australian Government can and should refuse entry to non-citizens or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere...*'. The instant consideration before the Tribunal does not involve cancellation of the Applicant's visa. It involves the question of whether or not there is another reason to revoke that cancellation. The Direction has nothing to say about any temporal requirement that analysis of this Primary Consideration is exclusively predicated on a time when a non-citizen is seeking to stay in or enter Australia.
38. The Applicant contends that by setting aside the mandatory cancellation, this Tribunal would be doing no more than treating that mandatory cancellation as though it had never been made.²⁷ Pursuant to s 501CA(5) of the Act the resulting contention is that the Applicant would thereby satisfy the Special Return Criteria (in Schedule 5 Item 5001 of the *Migration Regulations 1994* ('the Regulations')) when being considered for any future application for another visa.
39. It can be accepted that revocation of the decision refusing to revoke the original mandatory cancellation decision would result in a scenario whereby, pursuant to s 501CA(5) of the Act, the original mandatory cancellation decision (made pursuant to s 501(3A) of the Act) would be taken to never had been made. This would, in turn, facilitate the Applicant's satisfaction of the Special Return Criteria such that he could be considered for the grant of another type of visa.

²⁷ A1, [26]

40. It can also be accepted that if this Tribunal does revoke the mandatory cancellation decision (s 501(3A) of the Act), then the Applicant would not satisfy the abovementioned Special Return Criteria. But that would not absolutely preclude the Applicant from possibly obtaining another visa. As noted in the abovementioned *Regulation* 5001(c)(ii), the Minister, acting personally, could theoretically grant a permanent visa to the Applicant. He has an application for a partner visa currently before the Minister. The Applicant contends that a decision by this Tribunal refusing to revoke the s 501CA(4) decision '*will mean his application [for a partner visa] is bound to fail.*'²⁸
41. This is not necessarily the case or cannot be presently known with any certainty. This is because the Minister's power to grant the partner visa is regulated by s 65 of the Act. Section 65(1)(a)(i)-(iv) stipulates four conjunctive criteria. If all four of those criteria are met, then the Minister's discretion is engaged. Section 65 of the Act expresses that discretion in binary terms – that is, depending on the Minister's level of satisfaction about whether a visa applicant satisfies the four conjunctive criteria, the Minister can then grant or refuse to grant the requested visa.

Is the Applicant's case unusual?

42. The Applicant puts this contention in these terms:

'The applicant's case before the Tribunal has always been that his case was unusual. His Visa was always a time-limited visa that never secured an enduring and permanent right to lawfully remain in Australia as a lawful non-citizen.

The applicant's migration status in Australia (from the last grant of his valid Visa prior to its cancellation) can be summarised in the following way:

(a) on and from 4 March 2019, the applicant held a valid visa and his presence in Australia was lawful (by reason of his being a 'lawful non-citizen;);

(b) on 19 November 2020, the applicant's Visa was cancelled under subsection 501(3A) and he became an unlawful non-citizen on and from that day – consequently, an officer was obliged to (and did in fact) keep him in immigration detention pursuant to s 189 of the Migration Act.²¹ An officer was also required to remove the applicant from the Commonwealth as soon as practicable pursuant to s 198 of the Migration Act;

(c) had the mandatory cancellation not happened, the applicant's Visa would have in any event expired by effluxion of time on or about 25 June 2021; and

²⁸ A1, [39].

*(d) absent the application for a new visa, on and from 25 June 2021, the applicant would (even if the mandatory cancellation had not happened) have become an unlawful non-citizen and (unless he chose to depart the Commonwealth) he would have been taken into immigration detention and removed pursuant to ss 189 and 198 respectively.*²⁹

43. To my mind, the Applicant's case is not unusual. The Direction clearly contemplates matters involving non-citizens who are/were in Australia on a limited stay visa or who had been participating in, and contributing to, the Australian community for a short time. Likewise, this Tribunal is not unfamiliar with situations where a visa is granted, it is then cancelled and the non-citizen is outside the migration zone at a time when a given matter is remitted to this Tribunal. The Direction is not agnostic to such a scenario.
44. The Applicant accepts that he does not fall within the auspices of s 501E of the Act and is not a person thereby prohibited from applying for another visa. In this vein, it is disingenuous for the Applicant to contend that he is forever prohibited from applying for another visa. As mentioned he has a pending application for a partner visa before the Minister and, as I have already found, item 5001(c) of the Regulations is not an absolute bar to the Applicant applying for another visa.
45. I therefore do not consider the circumstances of this matter to be unusual and, to whatever extent it may be thought they are, they do not obviate the Tribunal's task to apply the Direction as it is required to do by s 499(2A) of the Act.

Deferral of this Tribunal's statutory task to another decision-maker?

46. The Applicant contends that this Tribunal's statutory task of applying the Direction to the instant task is best left to a future decision maker who will then ascertain whether s 501 of the Act precludes the grant of that visa. Support for this contention is sought from s 65 of the Act. In the third of the four conjunctive criteria of s 65, the Minister must be satisfied that the grant of the visa sought by the Applicant is not prevented by (inter alia) s 501 of the Act.
47. It is difficult to see how this Tribunal's statutory task is displaced by the Minister's possible future consideration (and determination) of any future visa sought by the Applicant. There is nothing in the Act or the Direction suggesting that this Tribunal is precluded from

²⁹ A1, pp 7-8, paras [32]-[33].

applying the Direction to the instant facts simply because the Direction may be applied by the Minister at some future point. As noted by the Respondent '*That Direction no. 90 may be applied at that future point does not exclude its application here.*' I agree.

48. I reject the contention that in meeting its statutory obligation to apply the Direction to the instant facts, this Tribunal is denying the Applicant the opportunity to seek a future visa. This Tribunal should act within the confines of its statutorily-obligated task and apply the Direction. Much was sought to be made of a situation where an adverse outcome for the Applicant in this proceeding would forever preclude the Applicant from applying for another visa to come here.
49. Harsh though this may sound, such a consideration is not within the ambit of this Tribunal's decision-making scope. This is so for two reasons. First, Item 5001(c) of the Regulations does not constitute an absolute bar on the Applicant's capacity to apply for another visa. Second, there is nothing in the language of s 501 of the Act permitting this Tribunal to make some kind of alternate '*conditional*' or '*contingent*' decision depending on a possible future outcome relating to the grant or non-grant of another visa. The responsibility of this Tribunal is straightforward: the decision under review is set aside or it is not set aside.

Conclusion about the utility issue

50. For the above reasons, the utility argument does not obviate or otherwise displace this Tribunal's statutory obligation to apply the Direction to the instant facts. Due to the absence of any temporal stipulation conditioning the application of the Direction, the Applicant's absence from Australia does not mean this Tribunal should not make an assessment about protection of the Australian community from any further offending by this Applicant. The same finding can be made with the assessment of the expectations of the Australian community. Likewise, it is difficult to comprehend how the Applicant's conduct that caused his visa to be mandatorily cancelled should not now be considered by this Tribunal in circumstances where his conduct was perpetrated in Australia and where there is the possibility of him returning here – albeit via the agency of another visa.
51. Indeed, this latter aspect is a curious element of the Applicant's case. On the one hand it is contended that the Tribunal's application of the Direction to the instant facts is of little or no utility. Yet on the other hand, it is said that the Direction's Primary and Other

Considerations ‘...do not outweigh giving [the Applicant] the opportunity to exercise that right [i.e to apply for another visa].’³⁰

52. As noted by the Respondent, there is a lack of clarity in the Applicant’s utility argument with reference to how or to what extent the Primary and Other Considerations in the Direction may apply to him.³¹ We are told that due to a claimed temporal issue (which I have rejected) of the Applicant not being in Australia at the time of this decision, Primary Considerations 1, 2 and 4 have no application. Yet, no such contention is made with regard to Primary Consideration 3, in respect of which we are told ‘...the applicant developed submissions that he was a father figure to his partner Lauren’s minor children.’³² At the Hearing before me, it was orally contended that the Tribunal should take into account the Applicant’s potential loss of links to the Australian community.
53. I am safely led to the conclusion (and finding) that the utility issue must be rejected. I reach the further conclusion (and finding) that the circumstances of this case are not unique and do not otherwise serve to displace this Tribunal’s statutory obligation to apply the Direction. I will now do so.
54. I will now turn to addressing the abovementioned Primary and Other Considerations.

55.

PRIMARY CONSIDERATION 1: PROTECTION OF THE AUSTRALIAN COMMUNITY

56. In considering this Primary Consideration 1, paragraph 8.1(1) of the Direction compels decision-makers to keep in mind the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that this country confers on non-citizens in the expectation that they are, and have been, law abiding, that they will respect important institutions and that they will not cause or threaten harm to individuals or the Australian community.

³⁰ A1, p 9, para [40(b)].

³¹ R3, [50]-[52].

³² Ibid, p 10, para [43].

57. In determining the weight allocable to this Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to consider:

- (a) the nature and seriousness of the non-citizen's conduct to date; and
- (b) the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

58. I will consider each in turn.

The nature and seriousness of the non-citizen's conduct to date

59. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 8.1.1(1) of the Direction specifies that decision-makers must have regard to the following:

without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:

violent and/or sexual crimes;

crimes of a violent nature against women or children, regardless of the sentence imposed;

acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;

crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;

any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));

where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, or an offence against section 197A of the Act, which prohibits escape from immigration detention;

with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;

the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;

the cumulative effect of repeated offending;

whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;

whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).

Paragraphs 8.1.1(1)(a)(i),(ii) and (iii)

60. There is little or nothing to cavil with the finding that this Applicant has convictions for crimes of violence against a woman and that such violence occurred in a domestic or family context. On 2 November 2020 he received respective convictions for (1) common assault – domestic violence offence; (2) assaults occasioning bodily harm – domestic violence offence; and (3) choking, suffocation, strangulation domestic relationship – domestic violence offence. Those offences fall squarely within the ambit of paragraph 8.1.1(1)(a) of the Direction and, as such, are viewed *very seriously* by the Australian government and the Australian community – as stipulated in the chapeau to this section. These three sub-paragraphs therefore strongly militate of a finding that the totality of this Applicant's conduct in Australia has been very serious.

Paragraph 8.1.1(2)(b)(i), (ii), and (iv)

61. There is nothing in the offending history of this Applicant suggestive of him being a party to causing a person to enter into a forced marriage. He has not committed crimes against vulnerable members of the community and he does not appear to have offended while in immigration detention. These three sub-paragraphs are not relevant to the instant determination.

Paragraph 8.1.1(2)(b)(iii)

62. This sub-paragraph refers to 'any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion'. There is nothing before me from either party propounding or otherwise making reference to this component of the Direction. I am satisfied it is not relevant.

Paragraph 8.1.1(1)(c)

63. This sub-paragraph precludes me from taking into account sentences imposed on this Applicant for: (1) any violent offending he may have committed against women or children;³³ (2) acts of family violence;³⁴ and (3) any sentence he received relating to conduct whereby he caused a person to enter into (or to become a party to) a forced marriage.³⁵
64. I am therefore precluded from taking into account the sentences for the three offences imposed on the Applicant on 2 November 2020. This is because those offences were crimes of violence committed against a woman and because they were crimes committed in a domestic or family context.
65. That said, the Applicant does have other convictions (and sentences) for non-precluded offending. In short compass they may be stated thus:

12 September 2019: wilful damage: fined \$200; ordered to enter into a recognizance in the amount of \$450 to be of good behaviour for an operative period of nine months; ordered to pay restitution in the sum of \$600;

31 August 2020: breach of bail and contravention of domestic violence order: ordered into a recognizance in the sum of \$100 to be of good behaviour for a period of 12 months;

23 February 2021: for the following offences the Applicant was convicted and not further punished over and above the custodial term of four months he received for precluded offending on that day.

contravention of domestic violence order (x2);

possess utensils or pipes etc. that had been used;

possessing dangerous drugs;

breach of bail condition.

³³Direction , para [8.1.1(1)(a)(ii)].

³⁴Ibid, para [8.1.1(1)(a)(iii)].

³⁵Ibid, para [8.1.1(1)(b)(i)].

66. It is well-established that the imposition of a custodial term upon an offender is seen as the last resort in the sentencing hierarchy. The Applicant's criminal history demonstrates that nearly all of the custodial terms imposed upon him were for precluded offending for the purposes of the Direction. The exception is the sentencing regime imposed on 23 February 2021 in which the five non-precluded offences were punished concurrently with the four month custodial term imposed for the precluded offending.
67. Apart from this four month concurrently served non-custodial term, the balance of the sentences imposed for this Applicant's non-precluded offending comprise (1) fines; (2) the entry of recognizances to be of good behaviour for a defined period; and (3) the payment of restitution for wilful damage to property.
68. It is therefore safe to find that the sentences imposed by the Courts for this Applicant's non-precluded offending are predominantly non-custodial. Therefore, this sub-paragraph 8.1.1(1)(c) can only moderately militate in favour of a finding that this Applicant's offending in Australia has been of a very serious nature.

Paragraph 8.1.1(1)(d)

69. The Applicant first arrived in Australia on 17 June 2007. His movement history indicates that he has made numerous trips to and from Australia (something like over 20 departures) up until 23 July 2013. Material previously submitted on his behalf indicates that:³⁶

he came to Australia 10 years ago as an international student when he was nearly 12 years of age;

he did schooling at Indooroopilly State high school, Ipswich Grammar and Marist College Ashgrove;

he completed an associated degree in civil engineering at TAFE Queensland in or around October 2019 with the intention of studying for engineering qualifications at degree level at either Queensland University of Technology or the University of Queensland;

³⁶ R2,G9.

in September 2019 he enrolled with another education provider for an advanced diploma course in civil construction design but did not complete this course due to the sentencing regime imposed on him on 2 November 2020.

70. For the purposes of these Reasons, I will assume the Applicant settled in Australia 10 years ago when he was nearly 12 years of age. His offending history – in sentencing terms – runs from September 2019 to February 2021. In terms of the date of his commission of offences, the criminal history runs from December 2018 to November 2019. On either metric, we are talking about a criminal history that runs for 12-18 months.
71. That offending history details the commission of 15 separate offences that were dealt with across four different sentencing episodes. The Applicant is currently 25 years of age. He became an adult in Australia in July 2015. All of his offending in this country was therefore committed as an adult. Is the offending frequent? I am of the view that it is. In an offending history that runs for 12-18 months, he committed 15 offences. In approximate terms, this amounts to one offence per month. In sentencing terms, the history amounts to a sentencing episode every 3-4 months. I am satisfied that the Applicant's offending in Australia has been frequent.
72. Is there any trend of increasing seriousness in the Applicant's offending? In the first of his two sentencing episodes, the Applicant was sentenced for offences comprising wilful damage, the contravention of a domestic violence order and for breach of a bail condition. On any objective view, the seriousness of the offending dealt with by the Brisbane District Court on 2 November 2020 was significantly more serious involving, as it did, five convictions for very serious offences of violence committed against a female.
73. There followed the convictions in February 2021 at the Brisbane Magistrates Court where, again, the Applicant was convicted for an offence of violence perpetrated against a female. This offending was committed in the context of hitherto uncommitted offending in the realm of dangerous drugs, involving the possession of such drugs and paraphernalia associated with the use of such drugs. This offending also involved respective breaches of a bail condition and a domestic violence order.
74. I am therefore satisfied (and I find) that there is a trend of increasing seriousness inherent in the Applicant's offending history. The frequency of the Applicant's offending and the

trend of increasing seriousness to be found within it are factors that squarely engage this sub-paragraph 8.1.1(d). Accordingly, it strongly militates in favour of a finding that this Applicant's offending in Australia has been very serious.

Paragraph 8.1.1(1)(e)

75. This paragraph compels an enquiry into the cumulative effect of the Applicant's repeated offending. It can be safely found that the Applicant's offending is demonstrative of a number of cumulative effects. First, the most significant cumulative effect involves the truly dreadful impact that his offending has had on its female victim. I agree with the Respondent's contention³⁷ that the sentencing remarks of His Honour Justice Dearden DCJ made at the sentencing hearing of 2 November 2020 make for sobering reading and that those remarks can only be read in one way.
76. His Honour's sentencing remarks are augmented by two additional things. The first is a series of graphic photographic evidence³⁸ depicting the physical injuries suffered by the victim. The second is the victim's impact statement which is worth reproducing in full:

'Victim Impact Statement

[Name of victim redacted]

Although it has been 12 months since the domestic violence took place, I am still affected by the impact of the crime daily. I initially experienced immense levels of anxiety and fear for my life and my family's when the relationship ended. It meant I couldn't leave my father's side or be left alone at any point without experiencing severe panic attacks. I started seeing a psychologist as I was having tremendous trouble sleeping at night. I experienced trouble sleeping due to constantly visioning flashback episodes of the events that took place and also experience terrifying nightmares.

I was diagnosed with Post-Traumatic Stress Disorder in October 2019 and continue to see a psychologist to assist in me coping with the trauma. I struggle daily with meeting new people and being in group settings, and leaving the family home for long periods. I am always hyper-vigilant in public situations, feeling as if I am constantly in the flight or fight response relentlessly checking my surroundings.

I struggle to interact and be around men and find it very difficult to relax even when I am around familiar people. I struggle considerably with trusting people and feel as though I have lost faith in humankind. It is hard to find the motivation to want to live as my self-worth has plummeted. This led me to lose a significant amount of weight in a very short amount of time - leaving me with distorted eating and exercising habits. I also find it hard to concentrate and focus which has affected

³⁷ R3, p 3, para [9].

³⁸ R2, pp 441-455.

my studies at university. Ultimately setting me back several months in graduating from my science degree which I commenced before the events took place.

Being cut off from all my family and friends for such a long time has meant I have had to rebuild all relationships from virtually scratch. I have had to try my best to rebuild trust within these relationships, especially with my Dad, two older brothers, and Auntie. The crime has had huge negative impact on my family. My father and two brothers still feel fearful of the perpetrator and what the aftermath of the court proceedings could mean. I have felt very lonely and isolated since leaving the relationship and my extreme levels of social anxiety have made it hard to make new friends, while also making it difficult to reconnect with old friends whom I was cut off from throughout the relationship.

The events that occurred at the end of September 2019 left me with bruising all over my body. I was in severe for weeks after escaping. I experienced difficulties with my memory following the strangulation. I had to have a CAT scan along with several MRIs on my brain because medical specialists believed my brain was deprived of oxygen at the time leading to memory loss.

Because my finances were also controlled and monitored for a long period it meant I was unable to work and did not have anything to my name financially. This meant I had to start from scratch once the relationship ended.

I no longer see the world as a safe place, even though I am living in Australia. Knowing I am living in the same city as him makes me still, to this day, very fearful of my life. Despite paying for lots of on-going medical expenses following the violence, I am trying hard to save up enough money to move interstate to hopefully gain some sort of normality. I am truly fearful that he still lives in Brisbane and in close proximity to my home and also to the university where I am currently studying and likely to be for several years to come.

[Name of victim redacted]

Date: 26/10/20³⁹

[Emphasis in original]

77. The second cumulative effect of his offending is to be found in his refusal to accept the lawful authority represented by official documents compelling him to do or refrain from doing something. Domestic violence orders are put in place to prevent the risk of further violence between the original perpetrator of the violence and the aggrieved. The Applicant has contravened domestic violence orders on at least three occasions and has been sentenced for those breaches. An analogous finding can be made with reference to his failure to observe bail conditions previously imposed upon him. He has breached bail conditions on two occasions and has been sentenced for both of those breaches.
78. A third cumulative effect of the Applicant's offending derives from the second. His refusal to follow lawful authority extends to his repeated failure to observe the laws and regulation

³⁹ R2, pp 456-457.

governing the operation of a motor vehicle on Australian carriageways. His traffic history appears in the material.⁴⁰ The traffic history runs for a period of three years. It discloses:

at least six speeding offences;

one offence of driving while using a mobile telephone (on 15 April 2017);

driving while under the influence of alcohol with a blood-alcohol reading of .138 which is over two and a half times (almost three times) the legal limit (on 13 December 2018);

his disqualification from driving for eight months consequent upon the immediately preceding drink-driving offence charged as mid-level but not over the high alcohol drink-driving limit (effective from 13 December 2018);

the suspension of his driving privileges in or about April 2019 consequent on further significant speeding offences.

79. I am satisfied that the Applicant's traffic history is confirmatory of the predominant theme in his offending of refusing to respect lawful authority. I have previously found that traffic offending has the potential to seriously injure and even claim the lives of other road users:

*'The Applicant's driving offences may, at first blush, be considered relatively minor when viewed against the balance of his history. However, the theme of attendant recklessness and indifference to laws and rules governing the operation of a motor vehicle is, in and of itself significant. Indeed laws that protect road users "go to the essential safety of the community."'*⁴¹

80. The above-described cumulative effects of the Applicant's repeated offending must militate in favour of a finding that the totality of his offending in this country has been of a very serious nature.

Paragraphs 8.1.1(1)(f) and (g)

81. I am not aware of any reference in the material to the Applicant's provision of false or misleading information to the Respondent's department. Indeed, the Applicant's history was committed after the date of his most recent arrival in Australia. Therefore, there is no possibility that he could have falsely completed an incoming passenger card, for example, at the time of seeking re-entry into Australia. Sub-paragraph 8.1.1(1)(f) is not relevant.

⁴⁰ Ibid, pp 458-460.

⁴¹ *Bartlett and Minister for Immigration and Border Protection (Migration)* [2017] AATA 1571 at [45] citing: *Apire and Minister for Immigration and Border Protection* [2014] AATA 193 at [16].

82. Likewise with sub-paragraph 8.1.1(1)(g) the material is silent about any formal warning issued to the Applicant in terms of the impact of his repeated offending on his visa status to remain in this country. This sub-paragraph should be put to one side and rendered irrelevant for present purposes.

Conclusion about the nature and seriousness of the Applicant's conduct

83. I have sought to apply each of the relevant sub-paragraphs appearing in paragraph 8.1.1(1) of the Direction. With particular reference to the relevant and applicable paragraphs to which I have referred, I am of the view that the totality of this Applicant's unlawful conduct in Australia can be readily characterised as *very serious*.

The risk to the Australian community should the Applicant commit further offences or engage in other serious conduct

84. **Paragraph 8.1.2(1)** provides that, in considering the risk to the Australian community, a decision-maker should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk of it being repeated may be unacceptable.
85. **Paragraph 8.1.2(2)** provides that, in considering the risk to the Australian community, a decision-maker must have regard to the three following factors on a cumulative basis:
- (a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct;
 - (b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:
 - (i) information and evidence on the risk of the non-citizen re-offending; and
 - (ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence; and
 - (c) where consideration is being given to whether to refuse to grant a visa to the non-citizen – whether the risk of harm may be affected by the duration and purpose of

the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

The nature of the harm to individuals or the Australian community were the Applicant to engage in further criminal or other serious conduct

86. Paragraph 8.1.2(2)(a) compels an assessment of the nature of the harm to individuals or the Australian community in the event of this Applicant engaging in further criminal or other serious conduct. It can be safely concluded that:

were the Applicant to offend in a similar brutally violent way against another female victim, one need look no further than the harm suffered by the abovementioned female victim of his offending for an indication of the nature of the harm that any future victim would suffer;

were the Applicant to again ignore the lawful requirements of official documents compelling him to do or refrain from doing something, then such conduct would involve the consumption of the community's law enforcement and judicial sentencing apparatuses;

were the Applicant again to involve himself of wilfully damaging the property of others, those victims would suffer quantifiable economic loss and damage as a result of that conduct;

were the Applicant again to involve himself in the possession and consumption of illicit drugs, the community's law enforcement and judicial sentencing apparatuses would again be engaged. Further, any future offending in the realm of illicit drugs would, again, so skew the Applicant's moral compass such as to pre-dispose him to the commission of further very serious offences;

were the Applicant again to operate a motor vehicle on an Australian carriageway in flagrant disregard of the laws and regulations governing that activity, other road users could suffer serious and significant injury with quite conceivably fatal consequences.

87. I am therefore satisfied (and I find) that were this Applicant to reoffend, the nature of the harm to individuals and/or the Australian community would be *very serious* and would likely involve physical, psychological and quantifiable economic harm to its victims including, quite conceivably, harm to a catastrophic level.

The likelihood of the non-citizen engaging in further criminal or other serious conduct (paragraph 8.1.2(2)(b))

(i) Information and evidence on the risk of the Applicant re-offending

88. Evidence of the Applicant
89. In his Personal Circumstances Form ('PCF') the Applicant provided the following information as to his belief about the risk of his offending in the future;
- 'He believes that after attending and completing counselling and other courses his remorse and appreciation that he has not only caused hurt to his former partner but to his family as well. He feel [sic] ashamed. But he is determined to turn his life around by taking all necessary steps to be a better person that will make his parents proud.'*⁴²
90. In his statutory declaration made on 12 December 2020 the Applicant said:
- 'I say that I pose no risk to the Australian community because besides these relationship-related matter [sic], I have not committed any crime nor am I going to ever do anything wrong.'*⁴³
91. In his oral evidence at the Hearing before me, the Applicant's **evidence-in-chief** was exclusively limited to him confirming the content of a more recent statement he made on 14 November 2022 as being true and correct.⁴⁴ The difficulty with this evidence is that the statement of 14 November 2022 says nothing about the Applicant's recidivist risk.
92. During **cross-examination**, the Applicant was taken to his offending history and accepted his commission of those offences and confirmed that he did not disagree with the content of that history.⁴⁵ He further confirmed that he had no issues with any of the offending described in that criminal history.⁴⁶ He accepted that in the past he had been a smoker of marijuana once or twice a week and that he had also used methamphetamine in the past.
93. It emerged during the cross-examination that the Applicant sought to introduce a level of obfuscation around the evidence concerning the very serious violent conduct resulting in

⁴² R2, p 64.

⁴³ Ibid, p 82, para [34].

⁴⁴ A2; see also Transcript, p 6, lines 36-47.

⁴⁵ Ibid, p 7, lines 26-28.

⁴⁶ Ibid, p 10, lines 42-45.

his respective convictions on 2 November 2020. He sought to suggest that, for example, he did not actually choke the victim and instead sought to characterize his conduct in these obfuscatory terms:

[THE APPLICANT]: ...I - I pushed her away. I didn't choke her but everything came up to choking and I accept the blame. Not the blame but my actions, sorry. Wrong word. Wrong word I used.

MR BYRNES: So, in terms of you just mentioned the choking there. Can you clarify what you mean about - it seems like you said you didn't choke her?

THE APPLICANT: I brushed her off by pushing her off - off of me and she fell down the ground and I accept by (indistinct) and things because my mouth was bleeding but in putting my hands and choking her, my hands wasn't on her neck. But I accept - I accept it. I accepted my actions due to there was mark on her skin and me acting by pushing her away and shoving her which that wasn't the way - if you love someone you don't act like that towards them and I'm truly ashamed of my actions with that.

MR BYRNES: Just to clarify that, it sounds like you are saying that you did not think you choked her?

THE APPLICANT: I did not lay my hands on her neck. That's what I am - - -

MR BYRNES: It is pretty simple - do you think you choked her?

THE APPLICANT: No, I didn't, but I accepted the consequences due to the marks on her skin and everything, which - you know, it wasn't a good look.⁴⁷

94. The Applicant then reconfigured his evidence and purported to attribute his very serious and violent conduct on two other bases: (1) his abuse of illicit substances; and (2) 'other pressures'. This is what he said in cross-examination:

'MR BYRNES: Okay. Now, do you think [victim's name redacted]' violence towards you gives some excuse to your behaviour?

THE APPLICANT: No, not at all. It was due to me taking substances, too, which I am not blaming me taking the substances for leading to that but it was other (indistinct) stressors from supporting her, helping her, and being there for her.

...

MR BYRNES: As part of your answer, you referred to "Other pressures". Are you saying that was what caused you to inflict violence against [victim's name redacted]?

THE APPLICANT: No, it was more to do with me trapping everything inside and not really speaking to anyone...

...

MR BYRNES: In terms of the external pressures, I just want to revisit that. At the least [sic] hearing, it seemed like you said that the outside pressure was something

⁴⁷ Transcript, p 11, lines 41-47; p 12, lines 1-13.

that caused you to be violent towards [victim's name redacted], or to that effect. I am just trying to find out what outside pressures you were facing at the time?

THE APPLICANT: The outside pressures was like - [victim's name redacted] wasn't working, for starters, and she was lying to her family by saying she has been living by herself, but she was living under my roof as I was supporting her; paying for rent; going to university to try and finish university; and still supporting her, which the appreciation from her family wasn't pleasant or likable towards me.⁴⁸

95. The Applicant was then asked about the extent whatever counselling he had undertaken. It emerged that the extent of his counselling in PNG involved speaking to parish priests:

'MR BYRNES: It seems like your interaction with counsellors is something that you consider important to not act violently in the future. Is that fair?

THE APPLICANT: Yes. I understand that speaking to a counsellors and actually going to men's health meetings like once a week or twice a week to hear other stories and other people's breakthroughs...

...

MR BYRNES: Have you been undertaking counselling in Papua New Guinea?

THE APPLICANT: I have been undertaking counselling. I have been speaking to parish priests, because there is not much counselling or mental health help over here...

...

MR BYRNES: That's a Catholic parish priest, is that right?

THE APPLICANT: Yes.

...

MR BYRNES: Yes. Mr Mamatta, I was asking about counselling in Papua New Guinea. I will just continue in that vein. I think mid-question, when the power cut out, I think you were talking about the availability of counselling in Papua New Guinea?

THE APPLICANT: Yes, I was speaking about how private counsellors are far, being in other provinces, and I have tried going in and seeing the doctors, and they have told me that only specialists that they have here are the ones that deal with people in the mental institute, which you need to be diagnosed with something to go and see them. The only recommendation they gave to me was speaking with a parish priest or an elder, so I decided to go speak to my parish priest.

MR BYRNES: Did you try any counselling via the internet or other electronic means?

THE APPLICANT: Yes, I did. I did try calling my old counsellors and things, but their availability slots were really filled up, so I couldn't get into any contact with many counsellors over here, which led me to talking to my parish priest, and due to

⁴⁸ Ibid, p 12, lines 15-19; Lines 27-30; p 13, lines 25-33.

*commitment with work, I tried to balance that. I would go after work and see the parish priest.*⁴⁹

96. He was then taken to the evidence in the material about him and his current partner having undertaken couples counselling and he responded thus:

'MR BYRNES: As I understand it, this is a summary of visits you did to the Centre of Human Potential, I think it is?

THE APPLICANT: Yes.

MR BYRNES: That is counselling that you attended in 2021, yes?

THE APPLICANT: Yes. I was doing it through video-calls with Lauren - couples counselling.

MR BYRNES: That's the couples counselling?

THE APPLICANT: Yes, and I did another counsel there, too, which is on page 84 on the back - with Denzil. That was private, between me and Denzil. (Indistinct words) in detention, with me and Denzil, privately.

MR BYRNES: Let's just deal with the couples counselling, please. That stops in July 2021, and you did not attend further couples counselling, is that right?

*THE APPLICANT: Yes, due to me speaking to the other counsellor.*⁵⁰

97. The Applicant referred to his fulsome participation in couples counselling and also spoke about how that assisted him to obtain insight into his offending and to more appropriately conduct his domestic relationship with his current partner, Ms Lauren David:

'MR BYRNES: Do you feel like you were participating fully in that couples counselling?

*THE APPLICANT: Yes, I was. As I learnt more about myself and got to hear more about Lauren and how she felt, what really meant the most to her, I got to understand her deeply, too, which for me was something which, as I said in our previous conversation, I needed to vent and speak to someone and actually be open with my feelings instead of trapping them in the bottle. For me, it brought me out more; I speak to Lauren every time and I tell her how I feel, what is going on. I open up more than what I did before, and it was thanks to counselling, couples counselling, and programs that we both did that brought us out from our nest and actually focused on what was more important to both of us, which was the girls' wellbeing and how we can be together as a family - to move past the dilemma that happened when I was young. I was a bit immature, wasn't really thinking right towards my actions, and every day I try proving to her and telling her that I don't want to go back to that dark time. No one wants to be treated, which I am truly ashamed of.*⁵¹

⁴⁹ Transcript, p 14, lines 8-12; lines 22-24; line 24; p 15, lines 35-47; p 16, lines 1-4.

⁵⁰ Transcript, p 16, lines 9-21.

⁵¹ Ibid, p 17, lines 4-17.

98. The Applicant was then taken to a specific page in the material that referred to the completion of a series of seven courses in August 2021.⁵² He agreed that this list comprises the total extent of the courses he had completed.⁵³
99. He was then taken to a report from a psychologist called Mr Denzil Hildebrand whose report dated 21 August 2021 appears in the material.⁵⁴ He agreed that he attended four sessions with Mr Hildebrand.⁵⁵ He denied undertaking the abovementioned seven courses (in August 2021) and the four sessions with Mr Hildebrand (also in August 2021) for the specific purposes of compiling evidence of rehabilitation for this matter's first ventilation in this Tribunal that occurred on 7 and 8 December 2021:

'MR BYRNES: When you were undertaking these courses and visiting with Mr Hildebrand, was the purpose in doing that to pull together evidence for migration proceedings?

*APPLICANT: No, not at all. It was for me to better myself and to focus on my past and how I can actually mould myself so I can be a better man; to be there for Lauren and the two girls.'*⁵⁶

100. The Applicant was then taken to a letter from Anglicare addressed to him and dated 21 October 2021. The relevant portion of that letter is as follows:

*'This letter is to confirm that you have contacted Anglicare on 21/10/2021 and expressed an interest in participating in the Living Without Violence group program for men. Due to current high demand, you have been placed on our Waiting List, and will be contacted before the commencement of the next available group, to schedule an initial assessment interview. Assessment interviews generally run over two consecutive sessions.'*⁵⁷

101. It transpired that the Applicant had left Australia and gone to PNG prior to having any opportunity to engage with the sessions offered by Anglicare:

'MR BYRNES: From what I gather from that, you were put on a waiting list for Anglicare counselling?

THE APPLICANT: Yes.

MR BYRNES: Now, did anything come of that?

⁵² R2, p 102.

⁵³ See transcript, p 17, lines 20-24.

⁵⁴ R2, pp 84-85.

⁵⁵ See transcript, p 17, lines 37-38.

⁵⁶ Transcript, p 17, lines 44-46; p 18, lines 1-2.

⁵⁷ R2, p 370.

*THE APPLICANT: I am still on the waiting list; they had been calling me every two weeks just to update me where my placing was in the waiting list, and still today I haven't gotten any call from them. I left Australia and came to Papua New Guinea, and I haven't gotten any call from them or anything, but I am still on the waiting list as per the emails and messages from them.*⁵⁸

102. The next topic of the Applicant's cross-examination involved two letters of apology that he respectively wrote to the female victim of his very serious and violent offending and her family. With reference to the apology letter addressed to the victim,⁵⁹ that letter is worth quoting in full:

'Apology Letter

To: [Name of victim redacted]

Date: 10/10/2021

Dear [Name of victim redacted]

Please allow me to apologize for what I done and for what I have put you through the duration of our relationship from 2016-2019. Mostly from the timeframe of 2018-2019 My behaviours were extremely inappropriate, violent, selfish, full of pride, immature, and lacked the respect to you and your family/friends who only deserved love, understanding, respect and appreciation.

I am deeply sorry and remorseful for actions that I have put you through in the past and for what you might be going through now. Once again, I am deeply sorry and embarrassed of my own behaviour.

When coming to realisation the seriousness of the charges and my actions I could only imagine the catastrophic impact that I have course on you and your family/friends. It was embarrassing, but I learned that nobody deserves to be treated or to undergo such poor behaviours I portrayed. In the future, I have every intention of curbing my thoughtless actions and learn to adjust my behaviours befitting the environment and situation.

With the behavioural courses I currently am undergoing with weekly psychologist appointments and family counselling with my new partner for the betterment of myself as an individual and for my future of my family and my partner and kids.

Again, I am sorry for my actions, and I hope that we can put this matter behind us. I look forward for you to find peace in your heart and for us to helping each other out in any possible way or from and to have more of a sense of clarity with each other. If you have any thoughts in this, please feel free to share.

Sincerely

*Ila Mamatta Jnr*⁶⁰

[Emphasis in original]

⁵⁸ Transcript, p 18, lines 7-15.

⁵⁹ R2, p 229.

⁶⁰ R2, p 229.

103. With reference to this letter the Applicant was asked why he waited until 10 October 2021 to forward this letter, and he responded thus:

'MR BYRNES: Okay. Now, why did you wait until 10 October 2021 to issue this letter?

THE APPLICANT: The letter was - the letter was written before the date but I reworded it, changed it, and gave it to my lawyer to pass it on. Due to they went - we had zero communication so if I had to send the letter to her mail, as an email or using a third person to talk, I would've breached my conditions which it was very hard for me to give the letter towards her without breaching my conditions. I had to speak to a legal operator to actually ask how should I go about it.

...

MR BYRNES: Okay. All right. So, you still could've issued this earlier though. Do you accept that?

*THE APPLICANT: Yes. Yes. I accept that.*⁶¹

104. The Applicant denied that his reason for sending this letter of apology (dated 10 October 2021) was to gather evidence for the first ventilation of this matter in this Tribunal which proceeded on 7 and 8 December 2021.⁶²
105. The Applicant was then taken to the second abovementioned letter of apology addressed to the victim's family. It is worth quoting that letter in full:

'Apology Letter

To: [Name of victim family redacted]

Date: 10/10/21

Dear [Name of victim family redacted]

This is a difficult letter to write, and I am sure it's even harder to receive, but I have to tell you how deeply sorry and remorseful of my actions and catastrophic impact I inflicted on the family and [victim's name redacted] especially. My violent behaviours were Truly injustice and utterly disgusting, I am truly ashamed of my actions and wholeheartedly take Full accountability of the punishment of my disgraceful actions. I took this more to heart now as a father realise that I did not just hurt [victim's name redacted], but I permanently damaged the lives of all of you, and all of [victim's name redacted] friends and co-workers as well.

I'm ashamed and sickened by what I've done. My cruelty and carelessness have caused more pain than I can ever repair. I know that this letter is too little and too late, but I want you to know how much I regret my actions.

I am deeply so sorry for the suffering and pain I've caused you. I truly can only imagine how traumatised she would be mentally, physically and emotionally affected with the trauma I caused therefore I fully Take responsibility in supporting

⁶¹ Transcript, p 19, lines 19-25; lines 45-46

⁶² Transcript, p 20, lines 10-11.

Financially for her medical, counselling, and psychology treatments that [victim's name redacted] is undergoing as I am truly ashamed and disgusted of myself of my actions. Again, I am deeply sorry of my immature actions with the catastrophic impact I have left on the family and [victim's name redacted].

Sincerely

*Ila Mamatta junior*⁶³

[Emphasis in original]

106. In cross-examination, the Applicant spoke about this second letter of apology in these terms:

'MR BYRNES: I suppose if I ask the same things you would have the same answers about this letter, about the previous letter?

THE APPLICANT: That letter was drafted the same way as - I knew how catastrophic it would be for the family to deal with the aftermath of what I've done so I needed to put my sincere to the family too, at the same time to the victim, because they all were under the same trauma that I've caused and how I've hurt them as a family. So, I really am sorry and ashamed of it.

...

MR BYRNES: I'll rephrase. Did you do anything other than send these letter in order to show your remorse to [victim's name redacted]?

*THE APPLICANT: I - I did it to show remorse and take ownership of my actions firstly, and secondly I could just imagine like how through my experience of going through gaol and detention how painful it felt, like felt, which for her it would've been on a different side which she is going through her own trauma and the pain of what I've caused...*⁶⁴

107. The Applicant also confirmed that he does not have any criminal history in PNG.⁶⁵ Due to administrative delay, he was not able to produce a written copy of that criminal history. The Applicant could vaguely recall having a traffic history in PNG, but due to administrative delay he was not able to produce a copy of that PNG traffic history.⁶⁶ To my mind, I do not think there will be anything remarkable in the Applicant's traffic history in PNG. I am prepared to accept his evidence (without documentary proof) that he does not have a criminal history in PNG. He otherwise accepted the traffic history he has compiled in Australia.⁶⁷

⁶³ R2, p 230.

⁶⁴ Transcript, p 20, lines 16-22; lines 27-32.

⁶⁵ See transcript, p 22, lines 43-47; p 23, lines 1-12.

⁶⁶ Ibid, p 23, lines 14-41.

⁶⁷ Ibid, p 22, lines 24-41.

(ii) Evidence of the Applicant's rehabilitation achieved by the time of the Decision

108. I have earlier discussed the extent of the Applicant's counselling in PNG involving him speaking to local parish priests in the Catholic Church. I have also referred to whatever attempts he has made to undergo couples counselling with his current partner, Ms David. As will also be recalled, there is reference in the material to a series of rehabilitative sessions the Applicant undertook in August 2021 and of the four sessions he had with Mr Denzil Hildebrand.⁶⁸ As will further be recalled, the Applicant made contact with Anglicare for certain counselling but got no further than being placed on their waiting list.⁶⁹

109. Report of Dr Sam Minge, Clinical Psychologist

110. There is before the Tribunal a report from Dr Sam Minge dating from 30 November 2021.⁷⁰ Dr Minge assessed the Applicant on 22 and 25 November 2021. Dr Minge conducted a mental state examination and noted that the Applicant denied any history of mental health problems. He thought there were '*...no indicators of current psychiatric symptoms aside from anxiety about his situation.*'⁷¹ Dr Minge made a detailed summary of the Applicant's personal history and included elements such as '*childhood and family history*', '*education and employment history*', '*relationship history*', '*mental health and "drug, and alcohol history"*'.

111. In terms of the Applicant's offending history, Dr Minge made a similarly detailed summary of the Applicant's '*forensic and violence history*' and looked at elements such as the Applicant's '*indexed domestic violence offences*'; and his '*other offending*'. Dr Minge conducted three psychometric testing methodologies upon the Applicant and reached the following provisional diagnosis:

'Provisional Diagnosis

On the basis of Mr Mamatta's self-report, psychometric questionnaires, collateral documents, and presentation at interview, I do not consider him to meet criteria for a mental health diagnosis. He met criteria for cannabis dependence in the past but does not currently. He presents with some acute anxiety, but I consider this to likely be situational; that is, his anxiety is an understandable response to his current predicament and will likely resolve when his legal situation does.

⁶⁸ R2, p.84.

⁶⁹ Ibid, p. 370.

⁷⁰ Ibid, pp 207-228.

⁷¹ Ibid, p 208, para [11].

Mr Mamatta possesses some dysfunctional personality traits but it is not clear whether these are sufficiently strong to warrant diagnosis of a personality disorder. He has some traits of borderline personality disorder (emotional instability, impulsivity, fear of abandonment in relationships), avoidant personality disorder (fear and anticipation of social rejection, avoidance of social situations, fear of embarrassment), and obsessive-compulsive personality disorder (perfectionism, preoccupation with details, rigidity, and stubbornness about ethical or moral issues).

*Mr Mamatta does not exhibit antisocial personality features such as lack of remorse, deceitfulness, or general callous disregard for the wellbeing of others.*⁷²

[Emphasis in original]

112. Dr Minge also conducted a ‘domestic violence risk assessment’ on the Applicant. He made this assessment via his use of the ‘Spousal Assault Risk Assessment Guide (“SARA”)’ which is a checklist-type tool that screens for the presence of risk factors related to spousal or family-related assault. Dr Minge thought the Applicant scored as follows on the SARA testing methodology:

*‘Mr Mamatta’s total score on the SARA was 14 out of 40. This places him in the ‘moderate or low risk’ group. Compared with a sample of offenders on probation, his score places him in the 62nd percentile (i.e., higher than 62% of the sample).*⁷³

113. Dr Minge then made the following finding about the Applicant’s level of risk of committing further offences in a domestic context:

‘Risk Statement

*After considering Mr Mamatta’s domestic violence risk factors along with the results of my assessment, I estimate that he presents a low risk of domestic violence reoffending in future. He committed his offences in the context of a difficult and highly conflictual relationship. Since being remanded and then breaching bail by liking the victim’s Instagram posts, it seems he served the rest of his (approximately one year) bail period without contacting the victim again. He has participated in counselling and completed courses related to domestic violence and anger management. He expresses a willingness to continue undergoing counselling into the future re to ensure he does not reoffend. He does not express attitudes supportive of violence nor antisocial attitudes more generally, and he presents as remorseful and ashamed of his behaviour. He is currently in an intimate relationship that both parties describe as supportive and committed.*⁷⁴

[Emphasis in original]

114. Dr Minge then concluded his report with the following summary and opinion:

⁷² R2, p 217, paras [73]-[75].

⁷³ R2, p 217, para [80].

⁷⁴ Ibid, p 218, para [81].

'Summary and Opinion

Mr Mamatta is a 24-year-old man from PNG who is seeking revocation of his visa cancellation. He was convicted of serious domestic violence offences against a partner in November 2020 and it seems he was violent for much of the relationship. After his arrest and charge, he twice breached the conditions of domestic violence orders (and bail) by contacting his ex-partner. He also has a conviction for drug possession as well as for an assault against a stranger that occurred around the time of his domestic violence offending.

Mr Mamatta is assessed as a low risk of reoffending.

Mr Mamatta presents as ashamed and remorseful for his offences.

Mr Mamatta has some dysfunctional personality traits including emotional instability, impulsivity, fear of abandonment in relationships, proneness to anger, anticipation of social rejection, moral rigidity, and perfectionism. These traits have made both intimate and nonintimate relationships difficult for him.

Mr Mamatta does not have antisocial personality disorder and is a generally prosocial man. He is rigidly moralistic and has strong Christian faith and family values.

Mr Mamatta's offences occurred in the context of a difficult and conflictual relationship with an intimate partner. He was stressed about his academic progress and had recently discovered he was adopted. His grandmother in PNG was dying at the time. The interaction of his personality style, these stressful life events, his youth and relationship inexperience, and his conflictual relationship **go some way towards explaining his emotional instability at the time and his use of violence in his relationship.**

Mr Mamatta does not demonstrate strong self-awareness generally. This is related to his dysfunctional personality traits and (in my estimation) his low average verbal intelligence. He also has a strong sense of shame about his offending. He therefore struggled to identify the internal dynamics of his domestic violence offences. He was, however, with repeated questioning able to nominate that he felt unappreciated by his then-partner, rejected by her family, resentful about what he perceived as her trying to control him, completely unsure how to deal with her mental health problems and anger outbursts, and unsure how to meet her needs. **He acknowledged that he tended to bottle his grievances up and then explode during arguments.**⁷⁵

[Heading emphasis in original; remaining emphasis in the text is by me]

115. Finally, it is necessary to look at Dr Minge's report from the perspective of the Applicant's current partner, Ms David. In his report Dr Minge tells us that Ms David has reached out to the victim of the Applicant's very serious domestically violent offending in order to obtain confidence about the relationship she now has with the Applicant. Ms David told Dr Minge that she did not believe the Applicant strangled the victim and that she otherwise feels very safe in her relationship with the Applicant:

⁷⁵ R2, p 219, paras [90]-[95], p 220, para [96].

'Ms David said that she had 'a lot of questions' about Mr Mamatta's offending and was concerned because her previous partner had abused her. She said that she reached out to his victim [victim's name redacted] and spoke on the phone to her multiple times to gather information, which gave her 'more confidence' about the relationship. She said that [victim's name redacted] encouraged her not to let her experiences with Mr Mamatta deter her from seeking a relationship with him. She said that she asked [victim's name redacted] directly whether Mr Mamatta strangled her, and that [victim's name redacted] provided a vague response. She reported that she does not believe that Mr Mamatta strangled [victim's name redacted].

Ms David said that she feels very safe with Mr Mamatta, and that he displays none of the signs of her abusive ex-partner. She said they have had a few arguments, and that Mr Mamatta will say, 'I just need five minutes' if things get heated, before returning to resolve the issue. She expressed admiration for the work Mr Mamatta has put into self-improvement, and for his successful abstinence from drugs.⁷⁶

116. During her cross-examination, Ms David appeared to retreat from her belief that the Applicant had not strangled the victim:

'MR BYRNES: Back to [Name of victim redacted], you were in contact with her after Mr Mamatta was sentenced, is that right?

MS DAVID: Yes.

MR BYRNES: And what did she tell you?

MS DAVID: We spoke three times and so obviously I asked her, did he do all of this, you know, is this the truth and she said, well, he's pleaded guilty and I can't say much more. But she said to not let what happened between them effect my relationship with him. So, you know, I guess I wanted further, you know, reassurance from another woman that, you know, he was going to be - well, continue to be the person I thought he was. And - - -

MR BYRNES: Did she talk about the choking?

MS DAVID: Well, that's all she said about it. She didn't go into detail. She just said he pled guilty, I don't - I can't go into more.

MY BYRNES: Do you believe that Mr Mamatta choked [sic] [victim's name redacted]?

MS DAVID: Yes.

MR BYRNES: On the same page, Mr Associate, can you please - I'll just find the spot. So paragraph 60, if you look at the last two sentences. Particularly the last sentence. So it looks like there you said to Mr Minge that you did not believe that Mr Mamatta strangled [victim's name redacted]?

MS DAVID: Yes.

MR BYRNES: Was that something that you said to Dr Minge?

MS DAVID: Possibly. Again, I don't remember the phone call that well, but I did find it hard to believe that he would do something like that.

MR BYRNES: But now you do believe it?

⁷⁶ R2, p 215, paras [60]-[61].

MS DAVID: Well, I do because he has pled guilty to it, so he shouldn't have pled guilty if he didn't do it.

MR BYRNES: I mean, he pleaded guilty by the time of this report and your discussion with Dr Minge, presumably?

MS DAVID: Yes, because I would have told him that I find that very hard to believe, but that's all - I mean, for me, I understand what he has been charged with and what he has done, and I have felt no threat towards me or to my daughters, and that's what is most important to me.

MR BYRNES: Is there any reason for the change between this time and your present view?

*MS DAVID: No. There is not.*⁷⁷

117. Cross-examination of the Applicant about Dr Minge's findings

118. During cross-examination, the Applicant was taken to a specific portion of Dr Minge's report involving the Applicant's conduct that saw him throw the victim of his domestically violent offending into the gutter. He was initially asked if he recalled that incident and he said that he did.⁷⁸ He accepted responsibility for this conduct and said that he was ashamed of it.⁷⁹ Then, the Applicant was taken to a specific portion of Dr Minge's report which, in the description of the 'gutter' incident, notes the following:

*'Afterwards he said that [victim's name redacted] kicked the gear stick in the car while he was driving, nearly causing an accident, which is when he hit her in the head. He denied throwing [victim's name redacted] in the gutter. He explained that he opened the car door and asked her to get out, and she tripped and fell out of the car.'*⁸⁰

[My emphasis]

119. The Applicant was challenged about this inconsistency in his evidence relating to the 'gutter' incident. This was his unconvincing response:

'MR BYRNES: So, I'm just trying to work out what you told Dr Minge?

THE APPLICANT: So - - -

MR BYRNES: So, I put to you, did you deny throwing [victim's name redacted] to the gutter when you spoke to Dr Minge?

THE APPLICANT: I did not deny throwing her to the gutter. I opened the door - I explained my side of the story towards her and the way she recalled it and the way - not she recalled it but from the police statement was given to the way I explained

⁷⁷ Transcript, p 37, lines 11-47.

⁷⁸ Transcript, p 7, lines 43-44.

⁷⁹ Ibid, lines 46-47.

⁸⁰ R2, p 214, para [53].

it towards her and she came up with her own summary, which I did tell her that that wasn't how it unfolded. I did not throw her to the gutter but as it was written and I accepted the consequences.

...

MR BYRNES: Can you see the words, "He denied throwing [victim's name redacted] in the gutter"?

THE APPLICANT: Yes.

MR BYRNES: What I'm trying to get at is that seems like you told - you actually denied throwing [victim's name redacted] in the gutter to Dr Minge?

THE APPLICANT: Yes. Which the statement says from her that I tried - I opened the door and she - she fell off and she came out because I slapped her on the thigh and she had a dead leg and that's why when I tried opening the door she came out and she fell on side of the gutter. So, therefore I did - I did not pull (indistinct) off the gutter but as it was written in the statement from the police and things, that's the way I accepted - accepted it. So, I (indistinct) told her my side of my story.⁸¹

Summary of findings around recidivist risk

120. As best as I have understood the evidence, the following findings can be made around the Applicant's recidivist risk:

Dr Minge's reached respective conclusions that this Applicant represented a low risk of domestic violence re-offending in future. This finding was based on the Applicant's SARA score of 14 out of 40 that placed him in the '*moderate or low risk*' group of potential re-offenders. Although called to give evidence at the previous ventilation of this matter in this Tribunal, Dr Minge was not called at the Hearing before me. His report is now in excess of 12 months old. It would have been interesting and informative to hear Dr Minge's views in the context of the Applicant and Ms David having recorded another year in their relationship and how, if at all, that further time in their relationship is informative of the Applicant's current level of recidivist risk;

it is difficult to reach any state of sufficient satisfaction about the level of rehabilitation undertaken by the Applicant to date. His rehabilitative efforts in PNG have been largely limited to consultations with local clergy. There appeared to be a flurry of rehabilitative courses in the several months leading up to the previous ventilation of this matter in this Tribunal in December 2021. Since then, the Applicant's rehabilitative efforts have been both unconvincing and largely

⁸¹ Transcript, p 8, lines 10-18; p 9, lines 4-13.

incomplete. He did contact Anglicare but went no further than being placed on their waiting list. He did have up to four counselling sessions with Denzil Hildebrand (again, quite close to the time of the earlier hearing in this matter). But those sessions ceased. I am not satisfied that the extent of the Applicant's rehabilitation can now safely be relied upon as a definitive basis for him not re-committing very violent conduct in a domestic context;

for a long period of his relationship with Ms David, the Applicant has been in PNG. Indeed, he and Ms David have not shared a domestic residence although they have stayed with each other on a short-term basis. Much of the Applicant's past very serious domestically violent conduct has been attributed to stressors arising in his own life and in the context of the life he shared with his previous de facto partner and victim. What is yet to be tested is the Applicant's capacity to regulate and control his capacity to deal with both personal and relationship stressors in the context of his relationship with Ms David. Put simply, we do not know how things would transpire if the Applicant returned to Australia, commenced living with Ms David and her two minor children and then re-experienced personal stressors and relationship stressors in his relationship with her. That quite realistic paradigm is something is yet to be tested;

there was also a concerning level of '*pushback*' or artificial denial by the Applicant in terms of the indicia or minutiae of his very serious domestically violent conduct in giving his evidence to this Tribunal. There was an all too frequent attempt to either self-servingly re-cast circumstances leading up to his offending or to otherwise re-define the conduct of the victim such as to suggest that he was unreasonably led or caused to become physically violent with her. After such re-casting attempts, the Applicant frequently retreated back to a position of purporting to express shame for his conduct. But he only did so after first trying to re-cast the offending circumstances and after that attempted re-casting was successfully attacked by the Respondent's representative in cross-examination;

the resulting observation is that there must now be at least some questions raised about the Applicant's claimed level of remorse and regret for his offending. Putting aside any restriction on him in dealing with the victim, the claimed letters of apology to her and her family were, on any reasonable view, late in their delivery and were sought to be provided at a time suspiciously close to the first ventilation of this matter in December 2021. My misgivings about the Applicant's claimed

levels of remorse have their echo in the findings of Dr Minge who noted that the Applicant '*...does not demonstrate strong self-awareness generally. This is related to his dysfunctional personality traits and (in my estimation) his low average verbal intelligence*';

it remains the case that the Applicant has a history of non-compliance with official documents compelling him to do or refrain from doing something. I have discussed his respective breaches in relation to (1) bail conditions, (2) domestic violence orders, and (3) the laws and regulations governing the operation of a motor vehicle on Australia carriageways. Any improvement in the Applicant's levels of compliance with lawful requirements seeking to regulate his conduct is a matter that, again, remains to be tested in the event of his further participation in the Australian community;

in terms of an actual findings for the level of the Applicant's level of recidivist risk, I find as follows: (1) in the absence of more current clinical evidence and in the absence of Dr Minge giving evidence to this Tribunal, I am of the view that the Applicant represents a low-moderate risk of domestic violence re-offending in the future; and (2) that he otherwise represents a low recidivist risk for other offending.

Paragraph 8.1.2(2)(c)

121. The Direction also contains a reference to paragraph 8.1.2(2)(c). With reference this specific paragraph, this matter does not involve a '*refusal to grant a visa to a non-citizen*'. It involves an application for the, '*revocation*' of a decision refusing to revoke the earlier mandatorily cancellation of the Applicant's visa. This specific paragraph is not relevant to the determination of this application.

Conclusion: Primary Consideration 1

122. With reference to the weight attributable to this Primary Consideration 1:
- (a) I have found that the nature and seriousness of the Applicant's conduct to date has been, '*very serious*';
 - (b) I have found that were this Applicant to reoffend, the nature of the harm to individuals and/or the Australian community would be *very serious* and would likely involve physical, psychological and quantifiable economic harm to its victims including, quite conceivably, harm to a catastrophic level; and

- (c) I have assessed the Applicant's recidivist risk of engaging in further criminal or other serious conduct upon return to the Australian community. In terms of an actual finding of his level of recidivist risk, I have found as follows: (1) in the absence of more current clinical evidence and in the absence of Dr Minge giving evidence to this Tribunal, I am of the view that the Applicant represents a low-moderate risk of domestic violence re-offending in the future; and (2) that he otherwise represents a low recidivist risk for other offending.

123. I make further reference to paragraph 8.1.2(1) of the Direction and, in particular, the notion of '*unacceptable risk*' which involves a risk that the community should not be required to tolerate regardless of other considerations. Having regard to the potential consequences of this Applicant re-committing any of his very serious domestically violent conduct, I am led to a finding that his offending has been so serious such that any risk of its re-commission is indeed unacceptable.
124. My analysis of the material before me leads me to a finding that this Primary Consideration 1 confers a *very heavy* level of weight in favour of affirming the decision under review.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

125. Paragraph 8.2 of the Direction provides:
- (1) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).
 - (2) This consideration is relevant in circumstances where:
 - a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or
 - b) there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.

(3) In considering the seriousness of the family violence engaged in by the non-citizen, the following factors must be considered where relevant:

- a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;
- b) the cumulative effect of repeated acts of family violence;
- c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:
 - i. the extent to which the person accepts responsibility for their family violence related conduct;
 - ii. the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);
 - iii. efforts to address factors which contributed to their conduct; and
- d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-citizen's migration status, should the non-citizen engage in further acts of family violence.

126. The initial exercise compelled by the abovementioned paragraph 8.2 of the Direction requires two questions to be addressed: (1) who was a member of the Applicant's family? and (2) whether any of the Applicant's conduct against those family members amounts to family violence? I will now address each question in turn.

Who are members of the Applicant's family?

127. I refer to the circumstances of the Applicant's offending culminating in his respective convictions on 2 November 2020 at the Brisbane District Court. Earlier in these Reasons, I particularized the specific charges for which he was convicted. In the sentencing remarks,

Justice Dearden DCJ noted that the Applicant had been in a romantic relationship with the victim since 2017.⁸² The Statement of Facts which is contemporaneous with the Applicant's convictions on 2 November 2020 relevantly notes the following:

*'The complainant is [name of victim redacted]. At the time of the offending, she was 21 years old and had been in a romantic relationship with the defendant since 2017. The pair began living together in February 2019.'*⁸³

128. Therefore, there is little or nothing to cavil with the proposition (and finding) that the victim of the conduct resulting in the Applicant's convictions on 2 November 2020 was a member of the Applicant's family at the time he perpetrated that conduct.

129. I am mindful that the definition of *family violence* at paragraph 4(1) of the Direction makes specific reference to '*a member of the person's family*'. Significantly, the Direction does not provide a definition for either '*family*' or '*family member*'. However, there are definitions of these terms which assist in the determination of the meaning of those terms as they appear in the Direction.

130. The *Acts Interpretation Act 1901* (Cth) ('AIA') is of relevance to the interpretation of the Direction. Section 46 of the AIA provides, in substance, that unless a contrary intention appears, expressions in an instrument have the same meaning as in the Act or instrument which enables or authorises them.⁸⁴ Section 5G of the Act relevantly provides that the member of a person's family is, '*...taken to include [...] (a) de facto partner of the person; ...*'.

131. Section 4(AB) of the *Family Law Act 1975* (Cth) ('FLA') provides as follows:

'Definition of family violence etc.

*For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful.*⁸⁵

[Bold in original]

132. Section 4(1AB) of the FLA provides as follows:

'For the purposes of:

⁸² R2, 36, lines 10-11.

⁸³ R2, p 438, para [1].

⁸⁴ See also *Jagroop and Minister for Immigration and Border Protection* (2016) 241 FCR461 at para [22].

⁸⁵ Note: this definition is verbatim the definition of '*family violence*' appearing in Direction 90 at para [4(1)].

...

(aa) section 4AB;

...

a person (the **first person**) is a member of the family of another person (the **second person**) if:

...

the first person is or has been married to, or in a de facto relationship with, the second person;...

[Bold in original]

133. To my mind, it is not coincidental that the definition of '*family violence*' in the FLA is stated in identical terms to the definition of that term appearing at paragraph 4(1) of the Direction. While the Direction does not contain a definition of the term '*family member*', the FLA certainly does. Applying the foregoing FLA provisions to the instant facts, I am of the view that for the purposes of the definition of '*domestic violence*' in the FLA, the '*first person*' (i.e., the victim of the Applicant's conduct resulting in the November 2020 convictions) can be found to be a member of the family of the '*second person*' (i.e. this Applicant) if the victim of conduct resulting in the November 2020 convictions, 'is or has been... in a de facto relationship with' this Applicant. [My underlining]
134. Given the commonality of terminology in terms of how the FLA and Direction deal with the question of family violence, I am of the view (and I find) that the subject victim of the Applicant's conduct resulting in the November 2020 convictions can be found to be a member of the Applicant's family for present purposes.
135. I therefore find that the victim of the Applicant's conduct resulting in the November 2020 convictions, was a member of his family for present purposes.

Did any of the Applicant's conduct constitute family violence?

136. 'Family violence' is defined in the Direction. It is defined as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**) or causes the family member to be fearful.'⁸⁶ To my mind, therefore, the definition poses two separate questions:

⁸⁶Direction , para [4].

was the Applicant's conduct violent, threatening, or other behaviour that coerced or controlled a member of his family?

was the Applicant's conduct violent, threatening, or other behaviour that caused a family member to be fearful?

137. One need look no further than (1) Judge Dearden's sentencing remarks; (2) the abovementioned Statement of Facts (contemporaneous with the 2 November 2020 sentencing date); (3) the abovementioned photographs of the victim shortly after perpetration of the conduct; and (4) and the Victim Impact Statement to be fulsomely satisfied that the Applicant's conduct was indeed violent, threatening and similar behaviour that sought to coerce or control a member of his family comprising the victim of that offending. I am so satisfied. I am likewise satisfied by reference to the abovementioned four sources of information referred to in this paragraph that the Applicant's conduct was indeed violent, threatening and that it was otherwise behaviour that caused the relevant family member (and victim) to be fearful.
138. I again refer to the above-described circumstances of the Applicant's very serious domestically violent conduct resulting in the November 2020 convictions. I am of the view (and I find) that pursuant to paragraph 8.2(2)(a) of the Direction, this Applicant has been both (1) found guilty of an offence and (2) has been convicted of an offence involving family violence. I therefore have no hesitation in finding that the Applicant's conduct towards his then de facto partner (and member of his family) resulting in the November 2020 convictions squarely engages the auspices of this Primary Consideration 2. Accordingly, I am satisfied that the Applicant's conduct resulting in the November 2020 convictions does constitute family violence against the victim for the purposes of the Direction.

Assessment of the seriousness of the Applicant's family violence

139. I will now consider each of the factors in paragraph 8.2(3)(a)–(d) in turn for the purposes of assessing the nature and seriousness of the Applicant's family violence conduct.
140. **Sub-paragraph 8.2(3)(a)** requires an analysis of the frequency of the Applicant's family violence conduct and/or whether there is any trend of increasing seriousness. As mentioned earlier, the Applicant has committed a total of 15 offences in Australia. Ten of

those offences have been committed in the realm of domestic violence. He has committed 10 domestic violence offences in a criminal history that runs for 12-18 months. His family violence conduct has therefore been frequent. Is there a trend of increasing seriousness? I am of the view that the Applicant's domestic violence offending has been very serious from its outset. Its level of seriousness is to be found in the circumstances leading to his convictions on

2 November 2020 and 23 February 2021. This sub-paragraph 8.2(3)(a) militates in favour of a finding that the Applicant's family violence conduct has been very serious.

141. **Sub-paragraph 8.2(3)(b)** requires consideration of the cumulative effect of repeated acts of family violence. One need look no further than the abovementioned Victim Impact Statement about the extent to which this Applicant's conduct has traumatized its victim:

*'I no longer see the world as a safe place, even though I am living in Australia. Knowing I am living in the same city as him makes me still, to this day, very fearful of my life... I am truly fearful that he still lives in Brisbane and in close proximity to my home and also to the university where I am currently studying and likely to be for several years to come.'*⁸⁷

142. Therefore, this sub-paragraph 8.2(3)(b) must strongly militate in favour of a finding that the Applicant's domestic violence conduct has been of a very serious nature.

143. **Sub-paragraph 8.2(3)(c)** requires consideration of any rehabilitation achieved by the Applicant at the time of my decision since his last known act of family violence. This sub-paragraph requires three enquiries:

- (i) First, sub-paragraph 8.2(3)(c)(i) looks for the extent to which the Applicant has accepted responsibility for his family violence related conduct. The Applicant expressed a level of both remorse and regret for his family violence conduct. As mentioned earlier, much of this remorse was initial sought to be expressed after attempts by him to re-cast his conduct in more self-servingly favourable terms;
- (ii) Second, sub-paragraph 8.2(3)(c)(ii) seeks to understand the extent to which a non-citizen comprehends the impact of their behaviour on the abused person. In a previously written statement, the Applicant said: '*...I am all too aware of the pain and suffering I have caused to so many*

⁸⁷ R2, pp 456-457.

*including particularly to the complainant but also to my own parents and siblings.*⁸⁸

- (iii) Third, sub-paragraph 8.2(3)(c)(iii) seeks to identify efforts made by a non-citizen to address the factors which contributed to their family violence conduct. The Applicant has completed certain courses in August 2021. He has also had four sessions of couples counselling with Mr Denzil Hildebrand in or about August 2021. Both the Applicant and Ms David undertook couples counselling via the Centre of Human Potential in 2021. Therefore, it cannot be said that the Applicant has not taken any steps to engage with a therapeutic process aimed at addressing the factors which contributed to his very serious domestically violent conduct.

144. The three inquiries compelled by this sub-paragraph 8.2(3)(c) lead to a finding that it is moderately militative of a finding that the Applicant's domestic violence conduct has been of a very serious nature.
145. **Sub-paragraph 8.2(3)(d)** requires me to look at whether the Applicant has, 're-offended since being formally warned, or otherwise since being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence'. The material contains reference to a Protection Order made on 13 February 2019.⁸⁹ It relevantly notes that the Applicant was in court when this Protection Order was made. It is, in my mind, safe to find that such orders usually carry a written warning about the consequences of the named respondent (the perpetrator of the domestic violence) about the consequences of any breach of that order or consequences relating to the commission of further acts of domestic violence.
146. Despite being present in court when the abovementioned Protection Order was made and despite the plain words of the order,⁹⁰ Applicant nevertheless proceeded to commit subsequently commit his very serious domestic violence offending. Therefore, this sub-

⁸⁸ R2, p 82, para [29].

⁸⁹ R2, p 466.

⁹⁰ The order provided as follows: *It is ordered by consent without admissions that:*

(1) The respondent must be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved.

paragraph 8.2(3)(d) must strongly militate in favour of a finding that the Applicant's domestic violence conduct has been of a very serious nature.

Conclusion: Primary Consideration 2

147. Having regard to the weight I have allocated to the various components of paragraph 8.2(3)(a)–(d) (inclusive), I am of the view (and I find) that this Primary Consideration 2 confers a *very heavy* level of weight in favour of affirming the decision under review.

PRIMARY CONSIDERATION 3: THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA

148. Paragraph 8.3(1) of the Direction compels a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA of the Act is in the best interests of a child affected by the decision. Paragraphs 8.3(2) and 8.3(3) respectively contain further stipulations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.
149. The Direction sets out a number of factors to take into consideration with respect to the best interests of minor children in Australia. Those include, relevantly:
- (a) *the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);*
 - (b) *the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;*
 - (c) *the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;*

- (d) *the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;*
- (e) *whether there are other persons who already fulfil a parental role in relation to the child;*
- (f) *any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);*
- (g) *evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;*
- (h) *evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.*

Identification of the relevant minor child/children

150. In his **PCF**, the Applicant was asked to list all minor children, including biological children, adopted children, and step-children. He responded with 'N/A' which I presume to be '*not-applicable*'. Later in his PCF the Applicant is asked '***Describe your relationship with each of your minor child/ren above including how often your contact/see the child/ren and the role your play in their life.***' The Applicant responded with '*Partner has 2 children from [sic] previous relationship who get along very well with the Applicant. Children are aged 4 and 1.*'⁹¹ Later again in his PCF, the Applicant was asked to describe any current impact that would be experienced by any minor children to which he is connected in the event of a negative outcome for him in this matter. He responded with '*If cant [sic] live together then relationship with children will also suffer.*'⁹² Finally in his PCF, the Applicant is asked to list all other minor children in his life including grand-children, nieces/nephews, foster children, etc. The Applicant has left this question blank and unanswered in his PCF.⁹³

151. In his statement of 12 December 2020, the Applicant spoke of having been in a relationship with Ms David for '*about a year*'.⁹⁴ He added that '*She has two young aged 2*

⁹¹ R2, p 60.

⁹² Ibid, p 60.

⁹³ Ibid.

⁹⁴ R2, p 82.

and 4. I get along very well with the children.’⁹⁵ In his more recent statement made on 14 November 2022, he said that:

‘...I cannot wait to come to Australia to reunite with Lauren’s daughters [Child AR] (5 years old) and [Child AV](3 years old). This is because, from the time Lauren introduced me to her daughters, my bonding with them has been special.

I have always treated [Child AR] and [Child AV] as my daughters and I have been a responsible parent to them. I enjoyed playing with the girls, feeding [Child AV] and entertaining them so Lauren could have time to do what she needed to while I was in Australia.’⁹⁶

152. In her statement of 14 November 2022, Ms David said:

‘I confirm that Ila has a special bonding with my daughter [Child AR] and [Child AV] and the girls miss Ila just as much as I do. Ila always treats my daughters as his own and enjoys spending time with them. He used to play with them, tell them stories, take them out and look after them when I was not around like their father while in Australia.’⁹⁷

153. The only other reference to other children I can find in the material appears in the Transcript. Towards the end of the Hearing when the Applicant’s representative was making closing submissions in reply, I briefly stood the matter down to allow that representative to compile a list of non-immediate family ties the Applicant may have in Australia. When the Hearing resumed, the Applicant read out a list of people in Australia with whom the Applicant may have other ties and in the course of doing so he referred to an ‘Aunty Mary’ who apparently had three children of her own. However, that particular Aunty Mary has not provided a statement in the history of this proceeding and we do not have any details of any of her three children.

154. I will therefore presume that the three children of Aunty Mary do not come within the auspices of this Primary Consideration 3. I will, however, presume and find that the two biological children of Ms David comprising the abovementioned daughters: Child AR aged 5 and Child AV aged 3. As best as I understood the respective submissions, both written and oral, the two relevant minor children falling within the ambit of this Primary Consideration 3 comprise Child AR and Child AV. Both of these children can (1) be safely found to be step-children of the Applicant; and (2) will be aged under 18 years at the time

⁹⁵ Ibid, p 83.

⁹⁶ A2, p 1, para 13; p 2, para 14.

⁹⁷ A3, p 2, para [13].

when this decision is due to be published. Both of those children are therefore relevant for this Primary Consideration 3.

The oral evidence of the Applicant

155. In **cross-examination**, the Applicant said that his relationship with Ms David commenced in late 2019.⁹⁸ He said that by early to mid-2020 the relationship developed to the point where he felt comfortable telling her about his offending and she telling him about having her two minor children, Child AR and Child AV.⁹⁹ He said that he met the two relevant children of Ms David in or around March 2020.¹⁰⁰ He was then on bail throughout 2020 and spent physical time with the children until November 2020, at which time he was taken into criminal custody.¹⁰¹
156. He agreed that he has had minimal physical contact time with the two relevant children because he met them in or about March 2020 but then had to go into criminal custody in November 2020. He said that after he was released from custody he went straight into immigration detention. He confirmed that during his time in prison or immigration detention, he maintained a level of contact with the children. He said the children visited him two or three times, but that he felt that prison/detention was no a good environment for the children to visit him:

'MR BYRNES: How many times did [Child AV] come visit you?

THE APPLICANT: Two, three times, but it was - like for me, I felt that it wasn't a good environment for her to walk into jail and prison area with high fences and things, so I normally would talk to her over the phone every night and [Child AR], would watch cartoons with them, spend entire time with them, even on the birthdays too, I would open presents with them over the phone and stuff.'¹⁰²

157. The Applicant spoke of being genuine about playing a step-fatherly role in the lives of the two relevant children. He confirmed there was a shared-care arrangement in relation to the parenting of the children concluded between Ms David and the biological father of the children:

⁹⁸ Transcript, p 24, lines 19-25.

⁹⁹ Ibid, lines 31-37.

¹⁰⁰ Ibid, p 25, lines 13-14.

¹⁰¹ Ibid, p 27, lines 29-35.

¹⁰² Transcript, p 27, lines 37-42.

'THE APPLICANT: ...And I - as stated, I kept reassuring her that I am genuine and I really do want to be a father to [Child AR] and [Child AV]; like, a stepfather. The way they portray me and the way they look at me. So I stated it by me asking her when I was incarcerated, trying to mean that before incarceration and through incarceration I was genuine with my feelings from the start, and still am genuine in my feelings for her and the kids.

MR BYRNES Mr Mamatta, you were talking about the children then. I take it that there's still a shared custody arrangement between the children - sorry, between Ms David and her former partner?

THE APPLICANT: Yes.

MR BYRNES: And so if you were to come back into Australia there would be a split arrangement, you would expect?

*THE APPLICANT: I would say I would ask the partner - like, the previous partner, Lauren and me to speak to a mediator so we can have a family plan. So what time is suitable for them - like, the girls to stay with their father? What time is suitable for me and Lauren? If it's okay for her - for him to have this trust and this feeling that the kids are in good hands. And at least we have someone there like a mediator to actually mediate the program for us and give us a family plan so we can go on and be there for the poor girls.'*¹⁰³

The oral evidence of Ms David

158. In **cross-examination** Ms David confirmed that the Applicant met the two relevant minor children in or about March 2020.¹⁰⁴ She confirmed that parental care of the children is subject to a shared-care arrangement between her and the biological father of the children:

'MR BYRNES: Is it the case that your children are still subject to - if I can put it this way - a shared custody with their father?

MS DAVID: Yes.

MR BYRNES: What is the arrangement with that?

*MS DAVID: That's still - he gets them Sunday at 10 am, and I then I pick them up from school and day-care on Wednesday.'*¹⁰⁵

159. Ms David was taken to one of her statements in which she described the Applicant as a father figure for her children. She responded thus:

'MR BYRNES: You referred to, in one of your statements, as Mr Mamatta being a father-figure. I am just trying to work out how soon after the relationship started was he seen as a father-figure?

¹⁰³ Transcript, p 31, lines 37-46; p 32, lines 1-9.

¹⁰⁴ Transcript, p 35, lines 10-11.

¹⁰⁵ Transcript, p 38, lines 16-20.

*MS DAVID: Well, obviously their relationship grew stronger and stronger as time went on. I wouldn't put any kind of date he became an official father-figure, but from the start he spent a decent amount of time with them, and on the phone or FaceTime, as he still does every day that I have them. They just love him so much. They call him stepdad. They ask to talk to him all of the time; it is just a special bond despite the distance, you know? He means a lot to them and I can tell they mean the world to him.*¹⁰⁶

160. Ms David was then taken to a bundle of photographs in the material.¹⁰⁷ Those photographs are predominantly depictions of the two relevant children. she was specifically asked why none of those photographs depicted the Applicant physically present with the children. She responded thus:

'MR BYRNES: May the witness be shown page 315 of the bundle? Perhaps if we scroll through, just slowly, to page 321 - I will ask questions about this. Ms David, while I was looking through those photos, I couldn't see any photos of Mr Mamatta physically present with your children?

MS DAVID: No. We didn't take any photos at that time.

MR BYRNES: During the period - because from my understanding or my calculation, the time that he could have been physically present with your children was, say, November 2019 through to November 2020. Does that sound right? As in, that's the period that he wasn't in detention or in prison?

MS DAVID: Yes.

MR BYRNES: But your relationship started early 2020?

MS DAVID: Yes.

MR BYRNES: If he had such a close relationship with them, one would expect that there would be photos of him with the children?

MS DAVID: Well, possibly. We really didn't take many photos together in that time.

MR BYRNES: There are no photos is your explanation? It is not on another device or something like that?

*MS DAVID: No, I don't think we took photos together.*¹⁰⁸

161. During her evidence I asked Ms David whether there was any prospect of her relocating to PNG in the event this Tribunal did not restore the Applicant's visa status to return here. She responded thus:

'SENIOR MEMBER: All right, just one question from me. Let's just say this doesn't go well for your partner and he is compelled, I suppose, to stay in Papua New Guinea, have you given thought to relocating there with the children? Because we have heard that you have travelled there?

¹⁰⁶ Transcript, p 38, lines 22-30.

¹⁰⁷ R2, pp 314-321.

¹⁰⁸ Transcript, p 38, lines 32-47; p 39, lines 1-2.

MS DAVID: Yes, I have been there three times this year and in December I will go again with the girls - - -

SENIOR MEMBER: Why?

MS DAVID: Well, because I am committed to the relationship and I love him - - -

SENIOR MEMBER: Well, think about the question. If you are going to go back in December - what, to see his family with the girls because is it fair to say that you are now well-known to them?

MS DAVID: Yes, definitely.

SENIOR MEMBER: You are going there in December - next month - to visit his family with your children?

MS DAVID: Yes.

SENIOR MEMBER: Because you consider that you have a close relationship with his family?

MS DAVID: Yes, very. I would love them to meet the girls and for Ila to spend quality time with them for three weeks, but I could not relocate them permanently. I don't think it is right for them; they deserve to be here in Australia - - -

SENIOR MEMBER: Would there be an objection from their father?

MS DAVID: Yes, absolutely. It wouldn't be okay, but if he is not allowed back then we will be devastated; I don't know how we are going to cope.¹⁰⁹

The respective contentions of the parties

162. The Applicant's SFIC is silent in terms of any commentary about, and weight allocable to, this Primary Consideration 3. However, in closing submissions, I had the following exchange with the Applicant's representative about whether or not this Primary Consideration 3 did apply to the Applicant:

'SENIOR MEMBER: Okay, so of the primary considerations, PC3 applies and it applies in his favour, on the strength of his connection with the two children of Ms David.

MR HARTNETT: Yes.

SENIOR MEMBER: Moderated though that I think will have to be by virtue of the reality that their biological father has generous, and quite fair, contact time with them, you'd agree with that?

MR HARTNETT: Yes, I think she said four nights a week.

SENIOR MEMBER: That's pretty good, Sunday to Wednesday?

MR HARTNETT: Yes.

SENIOR MEMBER: Every cycle, all the time, it's not every second weekend or anything, it's pretty full on. So, it's going to be hard to give him any kind of

¹⁰⁹ Transcript, p 43, lines 5-29.

determinative weight for primary consideration three even in the circumstances of that, right? So primary consideration four doesn't apply, no? That's right?

*MR HARTNETT: Yes, yes, as in yes it doesn't apply.*¹¹⁰

163. In the Respondent's SFIC, there is an application of the factors appearing at paragraph 8.3(4) of the Direction and the following conclusion is reached.

*'Overall, the Minister accepts that this consideration may weigh slightly against non-revocation (with the weight reduced based on the above considerations). This consideration reflects the flipside of the Applicant's contentions regarding Direction no. 90 and it is notable that the Applicant will not immediately be re-united with the children if the cancellation decision is revoked given he is in PNG and any resumption of the relationship (in a fulsome way) would presumably be subject to the partnership visa being granted.'*¹¹¹

164. During closing submissions made by the Respondent's representative, the following exchange occurred between us:

'SENIOR MEMBER: Yes, one thing. What do you say in relation to primary consideration 3 and weight allocable to the applicant and the extent to which it needs to be moderated, if at all, based upon the fact that there is a present parent of the children who has secured an agreed parenting plan of basically week about contact or as close as possible to that?

MR BYRNES: Yes. Yes. Well, there's a couple of things to say. Firstly, that it shows that whatever role the applicant would have if he were to return to Australia that it would be more limited. So there wouldn't be a 100 per cent parental role, if I can put it that way.

SENIOR MEMBER: And the application of the factors at 8.3(4), particularly as they relate to the prospect of him playing some kind of parental role need to be moderated against the reality of the present other parent.

*MR BYRNES: Yes, yes, I agree with that. Yes, I think so. And also one must remember that I can't have my cake and eat it too in terms of the assessment of this does - is also sort of conditional on getting a further visa as well. So, and I accept that that is within something that the tribunal should look at, in my submission. But yes, that's right, so I think the nature and the duration of the relationship for example, the children have a father figure already. And so, there's their actual father, so those kinds of things do diminish the weight in my submission, in these circumstances.'*¹¹²

Application of factors in paragraph 8.3(4) of the Direction to the relevant child(ren)

165. **Sub-paragraph (a):** the evidence points to a limited nature and duration of the relationship between the Applicant and the two relevant children. The relationship with Ms

¹¹⁰ Transcript, p 71, lines 6-28.

¹¹¹ R3, pp 18-19, para [78]

¹¹² Transcript, p 68, lines 4-26.

David did not start until late-2019/early-2020. He did not meet the children until around March-April 2020. In November 2020, he went into criminal custody and then straight into immigration detention. Either or both of the children only visited him two or three times while he was removed from the Australian community. It is difficult to accept that during the approximate half-year period between March/April 2020 and November 2020, the Applicant developed any sort of genuine parental bond with the two relevant children.

166. It should also be noted that there have been long periods of physical absence of the Applicant from the lives of the two relevant children. This, in turn, has resulted in limited meaningful physical contact between him and them. Most significantly, the extent of any past or future parental role this Applicant will be able to play will be impacted by the current shared-care arrangement between Ms David and the children's biological father which sees the father caring for the children from Sunday morning until after school on Wednesday on each and every week. I am therefore of the view that this sub-paragraph (a) militates moderately in favour of a finding that it is in the best interests of the two relevant children for the Applicant's visa status being restored to him.
167. **Sub-paragraph (b):** to my mind, the Applicant's evidence is not of great assistance in terms of establishing any parental role he may have played to date. However, his evidence is of greater value in terms of whatever future parental role he may play. I recall his evidence to the effect that '*...I am genuine and I really do want to be a father to Child AR; like, a step-father*'. This genuineness seems to parallel that which is referable to his relationship with Ms David. I am not suggesting it is highly likely the Applicant will play a positive parental role in the future, but that the evidence does point to this scenario as a possibility.
168. On that assumption, there is ample time for him to play such a role because both children do not turn 18 for another 28-29 years of cumulative parenting time. What militates against the Applicant's prospects in this regard is the reality that the children's biological father does have a shared care arrangement with Ms David. This should not necessarily adversely or fatally impact any finding in the Applicant's favour about weight allocable to this sub-paragraph (b). I am therefore of the view that this sub-paragraph (a) militates moderately in favour of a finding that it is in the best interests of the two relevant children for the Applicant's visa status being restored to him.

169. **Sub-paragraph (c):** the two relevant children were not part of the Applicant's life at the time he committed his very serious domestically violent offending. So neither of the two relevant minor children would have experienced any negative impact as a result of that past offending. Of course, were the children to be exposed to or otherwise drawn into the orbit of any future similar conduct by this Applicant, they would be negatively impacted as a result. To my mind, the safest course is to put this sub-paragraph (c) to one side and render it neutral for present purposes.
170. **Sub-paragraph (d):** according to the evidence of Ms David, the children know who the Applicant is and that they otherwise have a demonstrable bond with him. Predictably, the Applicant says the same thing. To whatever extent the two relevant children would be impacted by the Applicant's removal there is the reality that they would be able to maintain contact with them him in other ways. In his evidence he spoke about spending virtual time with the children in the form of communicating with them via the telephone but also by electronic platforms by which he shared activities with them such as watching cartoons and opening presents. Having regard to (primarily) the evidence of Ms David about the extent to which the two relevant children have established a bond with the Applicant, I will allocate (at best) a moderate level of weight to this sub-paragraph (d) in favour of a finding that it is in the best interests of the two relevant children for the Applicant's visa status being restored to him.
171. **Sub-paragraph (e):** it is plain from the evidence that the biological parents of the two relevant children already fulfill a parental role in their lives. Their biological father has a shared care arrangement with Ms David for the care of the children. It cannot be said (or found) that Ms David desperately requires parental support for the children from the Applicant. This sub-paragraph should be put to one side and rendered neutral for present purposes.
172. **Sub-paragraph (f):** both of the children are too young to be able to express any views of their own about how they would be impacted in the event of the Applicant's removal. Although not determinative, despite the very large number of photographs of the children in the material,¹¹³ there is a notable absence of any photographs depicting the Applicant with the children. Overall, I am of the view that this sub-paragraph should be put to one side and rendered neutral for present purposes.

¹¹³ See R2, pp 313-321.

173. **Sub-paragraph (g):** there is no evidence before the Tribunal that either of the relevant children have been, or are at risk of being, subject to family violence perpetrated by the Applicant or that either of the relevant children have been adversely dealt with by the Applicant in any of the modalities stipulated in this sub-paragraph. It is not relevant to the instant determination.
174. **Sub-paragraph (h):** there is no evidence before me to suggest either of the relevant children have suffered or experienced any of the trauma types described in this sub-paragraph as a result of the Applicant's past conduct. It is not relevant to the instant determination.

Conclusion: Primary Consideration 3

175. Having regard to the material before me and upon an application of the abovementioned paragraph 8.3(4) factors to that material, I am of the view that this Primary Consideration 3 confers a *moderate, but not determinative* level of weight in favour of setting aside the decision under review.

PRIMARY CONSIDERATION 4: THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

176. The Direction makes clear that the expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.¹¹⁴ The Direction further explains:

*'This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated [in paragraph 8.4(1)–(3) of the Direction], without independently assessing the community's expectations in the particular case.'*¹¹⁵

177. With reference to the propositions in paragraph 8.4(1) of the Direction, the architecture of this sub-paragraph can, to my mind, be expressed thus:

- (a) the Australian community expects non-citizens to obey Australian laws while in Australia; and

¹¹⁴Direction 90, para [8.4(3)].

¹¹⁵Ibid, para [8.4(4)]. Paragraph 8.4(4) codifies the position laid down by the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* (2019) 272 FCR 454.

(b) as a norm, where a non-citizen has either:

- breached the expectation in the immediately preceding sub-paragraph (a); or
- there is an unacceptable risk that the non-citizen will breach the expectation in the immediately preceding sub-paragraph (a);

178. then, the Australian community expects that the Australian government will not allow such a non-citizen to enter or remain in Australia.

179. This Applicant has breached the Australian community's expectations by his convictions for very serious domestic violence offending. On this basis, the Australian community, 'as a norm' expects the Australian government not to allow him to enter or remain in Australia.

180. In addition to the guidance provided by paragraph 8.4(1) of the Direction, paragraph 8.4(2) of the Direction directs that a visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

- (a) *acts of family violence; or*
- (b) *causing a person to enter into, or being party to (other than being a victim of), a forced marriage;*
- (c) *commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;*
- (d) *commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or*
- (e) *involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or*

(f) *worker exploitation.*

181. Earlier in these reasons, I have found that the Applicant has committed a number of very serious and violent offences in a domestic context. The Applicant's commission of this very serious conduct necessarily engages the principle in paragraph 8.4(2), which means the Australian community expects that the Australia Government can and should cancel the Applicant's visa.
182. The final question is whether there are any factors which modify the Australian community's expectations. This question is informed by the principles in paragraphs 5.2(4) and (5) of the Direction. In summary these are:
183. (a) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa;
184. (b) the Australian community has a low tolerance of criminal or other serious conduct by non-citizens who have been participating in, and contributing to, the Australian community for only a short period of time;¹¹⁶
185. (c) Australia *may* afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life;¹¹⁷ and
186. (d) the nature of a non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify a visa outcome that is not adverse to the non-citizen.¹¹⁸
187. In relation to sub-paragraph (a) of the immediately preceding paragraph [173] of these Reasons, the Applicant was on a '*limited stay visa*' when his offending occurred. The term '*limited stay visa*' is not defined in the Act. However, the Act does classify visas into categories. Relevantly for present purposes, s 30 of the Act contemplates both (1) '*permanent*' visas, which permit a right to remain, '*indefinitely*'; and (2) '*temporary visas*', which provide a conditional right to remain. '*Limited stay*', as used in the Direction, seems

¹¹⁶Direction, paragraph 5.2(4).

¹¹⁷Ibid .

¹¹⁸Ibid, paragraph 5.2(5).

to be a reference to non-permanent or, '*temporary*' visas. The Applicant did not hold a permanent visa. I am therefore of the view that the Australian community would have a lower tolerance of his criminal offending in Australia.

188. In relation to sub-paragraph (b) of the abovementioned paragraph [173] of these Reasons, the Applicant has resided in Australia on a more or less permanent basis since 2013. The Applicant has primarily been a student in Australia. He does have some measure of a history of remunerative employment which is recorded in the report of Dr Minge:

*'Mr Mamatta said that his paid employment has chiefly been for his father's engineering company. He said that he began working for the company in 2015 (age 17 to 18 years). He took a break to work as a bartender in 2016 for about seven months because he was studying hospitality in year 12 and needed to obtain his Responsible Service of Alcohol Certificate. He returned to work for the family business as a soil technician in 2017 until his incarceration in late 2020. He described himself as a hard worker and denied any concerns being raised about his work performance.'*¹¹⁹

189. Whatever participation in, and contribution to, the Australian community he may have made cannot be safely found to have been '*short*'. Therefore, the Australian community's tolerance is not lowered by this component of the principles in paragraph 5.2(4) of the Direction.
190. In relation to sub-paragraph (c) of the abovementioned paragraph [173] of these Reasons, I repeat that the Applicant had resided in Australia on a more or less permanent basis since 2013. He has therefore spent the best part of a decade in this country. This means that the Australian community has a higher than usual tolerance of criminal, or other serious conduct by the Applicant.
191. In relation to sub-paragraph (d) of the abovementioned paragraph [173] of these Reasons, I am of the view that the balancing exercise between (on the one hand) the harm that would be caused by him re-offending and (on the other hand), whatever countervailing considerations may work in his favour, is not necessarily a principle referable to the community's expectations for present purposes. This is because I am satisfied that the Applicant's conduct (thus far) and the resulting harm from that conduct has been of a such a serious magnitude such as to dispel any applicable countervailing considerations.

¹¹⁹ R2, p 210.

192. Having regard to the discussion around the abovementioned sub-paragraphs (a)–(d) (inclusive) referenced in paragraph [173], I am of the view that the Australian community's expectations *are not* modified such that the community does not have a higher than usual tolerance of criminal conduct by him. Because of his very serious domestic violence offending which involved violent offending against a woman, I am of the view that the community expects the Government can and should cancel his visa.¹²⁰

Conclusion: Primary Consideration 4

193. Primary Consideration 4 confers a *heavy* level of weight in favour of affirming the decision under review.

OTHER CONSIDERATIONS

194. It is necessary to look at the Other Considerations listed at paragraph 9 of the Direction. I will now consider each of the four stipulated sub-paragraphs (a), (b), (c) and (d).

Other Consideration (a): International non-refoulement obligations

195. The Applicant's SFIC is silent on the issue of non-refoulement. In closing oral submissions, the Applicant's representative confirmed that this Other Consideration (a) does not arise on the instant facts.¹²¹ In the Respondent's SFIC, this Other Consideration (a) is said to be '*not relevant*'.¹²² In the Respondent's oral closing submissions, the Respondent's representative also confirmed that this Other Consideration (a) is not engaged by the instant facts.¹²³

196. The parties are therefore *ad idem* that this Other Consideration (a) is not relevant to the instant determination. I agree.

Other Consideration (b): Extent of impediments if removed

197. The Applicant's SFIC is silent on the issue of impediments. During closing submissions, the submission from the Applicant's representative was that this Other Consideration (b) is

¹²⁰Direction, para [5.2(3)].

¹²¹ Transcript, p 57, lines 1-5.

¹²² R3, p 19, para [81].

¹²³ Transcript, p 67, lines 17-20.

predicated on impediments are non-citizen would face ‘...if removed from Australia to their home country.’ According to this submission, on the instant facts, the Applicant is in PNG and thus this Primary Consideration (b) is not relevant.¹²⁴

198. In the Respondent’s SFIC there is broad agreement with the Applicant’s position:

‘The Applicant is presently in PNG, so, technically, this consideration is not enlivened because it involves the assessment “if” removed from Australia. This is a different point to make from the Utility Issue because this particular consideration is expressly focused on the impediments if removed.’¹²⁵

199. Be that as it may, the Respondent proceeds to make an assessment¹²⁶ of whatever impediments the Applicant would face in the event of a possible return to PNG and reaches this conclusion: ‘Overall, if considered relevant, the Minister submits that this Consideration would be neutral in any event.’¹²⁷

200. The language of this paragraph 9.2 of the Direction is oriented towards a presumption that an applicant is to be removed from Australia and, *in that event*, compels a decision-maker to assess the extent of impediments non-citizen would face in the event of such removal taking into account the items specified in sub-paragraphs 9.2(1)(a), (b) and (c). In this case, the Applicant voluntarily left Australia and returned to PNG in March 2022. He has therefore resided in PNG for the best part of a year.

201. I am cautious about arbitrarily dismissing the relevance of this Other Consideration (b). True it is that the Applicant is presently in PNG but having regard to the scope of the statutory obligation imposed on the Tribunal to take the Direction into account, I think it is prudent to at least provide some measure of analysis of the relevance (and weight) allocable to this Other Consideration (b). I will now look at each of the three sub-paragraphs forming part of this Other Consideration.

202. **Sub-paragraph 9.2(1)(a)–the non-citizen’s age and health:** to my mind, the material contains two primary sources of evidence relating to the applicant’s age and state of health. First, in his PCF, the Applicant is asked ‘**Do you have any diagnosed medical or**

¹²⁴ Transcript, p 67, lines 9-14.

¹²⁵ R3, pp 19-20, para [83].

¹²⁶ R3, p 20, paras [84]-[85].

¹²⁷ Ibid.

psychological conditions? The Applicant ticked the 'No' box.¹²⁸ No medical conditions are recorded in the PCF. No regime of medication appears in the PCF. There is no reference to any doctor/health professional/counsellor assisting or providing the Applicant with any treatment.¹²⁹

203. Second, the report of Dr Minge (dating from 30 November 2021) confirms that the Applicant told him he had not seen any mental health clinicians in his life and had never been prescribed psychiatric medications.¹³⁰ Dr Minge formed the view that *'On the basis of Mr Mamatta's self-report, psychometric questionnaires, collateral documents, and presentation at interview, I do not consider him to meet criteria for a mental health diagnosis.'*¹³¹ Dr Minge further observed that the Applicant's legal difficulties with his visa status had exposed some dysfunctional personality traits within his psychopathy.¹³² Dr Minge added that the Applicant *'...does not have antisocial personality disorder and is generally a prosocial man. He is rigidly moralistic and has strong Christian faith and family values.'*¹³³

204. The Applicant is a physically fit and robust 25 year old man in the prime of his life. I am not able to discern any physical malady affecting him. While the Applicant has sought counselling-type support for the factors previously pre-disposing him to very seriously offend, there is no suggestion that he has mental health symptoms requiring urgent clinical intervention. Therefore, this sub-paragraph 9.2(1)(a) must be put to one side and rendered neutral for the purposes of the instant determination.

205. **Sub-paragraph 9.2(1)(b)—whether there are any substantial language or cultural barriers:** the Applicant's first arrival in Australia was in June 2007. He was 10 years old at the time. There followed a multiplicity of departures and arrivals in and out of Australia. I have earlier mentioned that he resided in Australia on a more or less permanent basis since 2013. He then voluntarily returned to PNG in March 2022. He is presently 25 years of age and, by the time of his 26th birthday in July of this year, the applicant will have spent approximately 11-12 years (or roughly half of his life) in PNG. I therefore do not accept

¹²⁸ R2, p 66.

¹²⁹ Ibid.

¹³⁰ R2, p 211, para [32].

¹³¹ R2, p 217, para [73].

¹³² Ibid, p 219, para [93]; see also p 211, para [32] and the reference to *'...ntil his legal problems...'*

¹³³ Ibid, para [94].

that this Applicant would face any substantial language or cultural barriers in the event of his removal and return to that country. This sub-paragraph 9.2(1)(b) must be put to one side and rendered neutral for the purposes of the instant determination.

206. **Sub-paragraph 9.2(1)(c)—any social, medical and/or economic support available to them in that country:** there is a Department of Foreign Affairs and Trade (‘DFAT’) Report in the material.¹³⁴ With particular reference to health services available in that country, the DFAT Report says this:

‘In 2019, the latest year for which data is available, according to the World Health Organization (WHO), PNG’s life expectancy was 63 years for men and 67 for women. PNG has some of the worst health indicators in the Asia-Pacific. The country’s health system is fragile, with poor health and immunisation outcomes, and has been assessed by the WHO as among the 10 worst in the world.

...

PNG’s rate of COVID-19 vaccination at 6.7 per cent single dose, 5.5 per cent double dose, is among the lowest in the world.’¹³⁵

207. It can therefore be accepted that in terms of publicly available medical/health care services available to him in PNG – were it necessary for him to avail himself of those services – those services will not be at a same or similar level as that of Australia. Be that as it may, there is little or nothing to cavil with the proposition that the Applicant does seem to derive from a family of means (at least in relative terms in PNG) and that he has enjoyed both social and economic support from his family.

208. In an earlier statement, the Applicant spoke of the nature and extent of his father’s business. The Applicant said the following:

*‘My father has been responsible for all of my expenses.
My father has worked with many Australian companies and has personally dealt with the key people of the companies such as:*

New Crest Mining (MMJV) - John Honke, Project Services Superintendent

Talisman Energy - Ben Warner, Project Manager Logistic/ PNG Site

Cardno Bowler(Hillcrest) - David Bowler, Senior Director

Leighton Contractors - Chris Ferrerier, Project Manager site Q1370

Exxon Mobil - Calyvin Schomerzer, Superintendent. Quality Assurance

Project Site Q1370

Centramin P/L - Principal Director. Queensland

¹³⁴ A4. This DFAT Report is current as at September 2022.

¹³⁵ A4, p 9, paras [2.16] and [2.17].

Shaw Urquhart - Principal Director. Queensland

Coffeey' Information - Matt Morley, Northern Regional Manager

Civilab Australia - Director Victoria

*Golder's Associates - Mike Sandilands, Technical Services Manager,
Queensland*

Trilab - James Russell. Queensland

ACS-Australia Calibration Services - Tim Kennon, Director, Melbourne

My father's firm provides services and which it is well equipped to do, such as Geotechnical & Geomorphology Engineering, Soils. Rock, Concrete & Constructions Testing, Specialist Geotechnical Instrumentation & Testing.

*My father is over 60 years of age and wishes to prepare my brother and I to one day take over the responsibilities. My brother who completed a diploma qualification from Wollongong University is already working in our father business in PNG, and it is also my intention to complete my education and then work in my father's business in PNG.*¹³⁶

209. The evidence contains several references to the Applicant's father providing support to both him and Ms David. With reference to the Applicant the Transcript of the previous ventilation of this matter in this Tribunal contains the following reference:

'MR BYRNES: Okay. Before you were talking about payment of costs and I think your evidence was to the effect that you were covering off costs for Ms David, is that correct?

THE APPLICANT: Yes.

MY BYRNES: But is your father responsible for all of your expenses?

THE APPLICANT: My father was, as now I am working, so it's more to do with my pay and the work with my job, so - - -

MR BYRNES: Okay, so when did that go up until, when was your father responsible for your expenses up until?

*THE APPLICANT: My father was responsible for me up to when I got sent in, he helped me cover off my lawyer bills but apart from that I had savings in my account which the card was given to Lauren and I told Lauren to access it through supporting her till I find a way to come out and I start working...*¹³⁷

210. With reference to Ms David, it appears that the Applicant's father is supporting her as well:

MR BYRNES: In some of your statements, you refer to Mr Mamatta making monetary contributions to you, did you know that?

MS DAVID: Yes.

MR BYRNES: Are you aware that Mr Mamatta's father had been supporting him?

¹³⁶ R2, pp 80-81, paras [12]-[16].

¹³⁷ Transcript, p 28, lines 23-36.

MS DAVID: Yes.

MR BYRNES: Was it the extent to which there was support provided - did you think it was from Mr Mamatta personally, or that it was money from his father?

MS DAVID: It was from both, and still is.

MR BYRNES: Still is?

MS DAVID: Yes.

MR BYRNES: How do they support you currently?

MS DAVID: Currently with bills, groceries - we kind of just work it out. If I need help on a bill and if Ila has the money from work, he will send it. He if need helps on his bills, then I will help him if he doesn't have anything at the moment. It is just like any normal relationship.

MR BYRNES: You are currently living with your father, still?

MS DAVID: Yes, I had to move out about three weeks ago when the lease ended and I couldn't find anywhere.¹³⁸

211. I am therefore satisfied that to the extent that the Applicant may require social and/or economic support, such support will be adequately available to him via the medium of his family. The only possible area of traction favouring the Applicant in relation to this sub-paragraph 9.2(1)(c) is to be found in the disparity between publicly available medical services between PNG and Australia. But even then, the Applicant will (1) be able to source such publicly available medical support as is available to other citizens of PNG; and (2) it is not a stretch of the evidence to suggest that his family would be able to afford privately retained medical care in PNG in the event he needed it.
212. Having regard to the findings referable to each of the three sub-paragraphs components of this Other Consideration (b), I am of the view that – put at its highest – it confers only a *slight, but not determinative*, amount of weight in favour of setting aside the decision under review. To be clear, this finding is based on the first two sub-paragraphs being rendered neutral and, with reference to the third one, the only factor marginally favouring the Applicant is the disparity between the standard of medical care between PNG and Australia.

Other Consideration (c): Impact on victims

213. This Other Consideration (c) requires that decision-makers must consider the impact of the section 501 or 501CA decision on members of the Australian community, including

¹³⁸ Ibid, p 41, lines 12-29.

victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.

214. The Applicant's SFIC is silent in terms of any commentary about this Other Consideration (c). During oral closing submissions, the Applicant's representative agreed that this Primary Consideration (c) was not relevant.¹³⁹

215. In the SFIC filed on behalf of the Respondent, there is an acceptance that:

*'...there is no evidence before the Tribunal going to this consideration (as in no evidence specifically to the section 501CA(4) decision, although there is a victim impact statement at RB 456 as to the impact of the criminal conduct). Accordingly, the Minister submits that this consideration is not applicable.'*¹⁴⁰

216. The thrust of the Respondent's contention is that the Victim Impact Statement was made in contemplation of, and with reference to, the Applicant's sentencing in November 2020 as opposed to comprising a document that contained a statement by the victim about *the impact of this decision on her*. As such, it is said that the subject victim impact statement cannot form the basis of an application of Other Consideration (c) for present purposes.

217. I will therefore not have regard to the subject Victim Impact Statement and put this Other Consideration (c) to one side and render it neutral.

Other Consideration (d): Links to the Australian Community

218. The Applicant's SFIC is silent about the allocation of weight to this Other Consideration (d). During closing submissions I checked with the Applicant's representative as to whether he thought this specific Other Consideration was relevant and he replied in the affirmative.¹⁴¹ In the Respondent's SFIC the Tribunal is urged thus:

*'The Applicant does not appear to rely on this consideration, based on the AFSIC. However, the Minister submits that it would be appropriate to consider this in keeping with the approach to the above considerations.'*¹⁴²

¹³⁹ Transcript, p 57, lines 17-30.

¹⁴⁰ R3, p 20, para [87].

¹⁴¹ Transcript, p 71, lines 30-40.

¹⁴² R3, p 20, para [88].

219. I will therefore proceed on the basis that this Other Consideration (d) is relevant to the instant determination. Paragraph 9.4 of the Direction requires that decision-makers must have regard to an Applicant's links to the Australian community. There are two factors which I must assess in determining the level of weight allocable to Other Consideration (d). They comprise: (1) the strength, nature, and duration of ties to Australia; and (2) the impact on Australian business interests if he cannot remain here. I will consider each in turn.

(1) Strength, nature, and duration of ties

220. With reference to the first part of this Other Consideration, three elements require consideration. First, it is necessary to have regard to the impact of a non-revocation decision on the Applicant's '*immediate family members*' where those people have a right to remain in Australia indefinitely. Second, it is necessary consider the impact of a non-revocation decision by taking into account the strength, nature, and duration of any '*other ties*' the Applicant has to the Australian community. Third, it is necessary to assess the strength, nature, and duration of any other '*family or social links*' the Applicant may have with people who have an indefinite right to remain in Australia. I will address each component in turn.

i. Impact of non-revocation on the Applicant's immediate family

221. In his PCF the Applicant refers to his mother as his only immediate family member residing in Australia.¹⁴³ I sought to clarify the position with regard to the residence of the Applicant's mother and his representative told the Tribunal '*the mother travels back and forth and is resident I think half here and half in Papua New Guinea*'.¹⁴⁴ The Applicant's father resides in PNG as do both of his adult siblings.¹⁴⁵

222. The only other person I am prepared to take into account as an immediate family member is Ms David. It is worth quoting the relevant portions of her statement:

'My name is Lauren David and I am an Australian citizen by birth. I was born in Brisbane and have lived here for 26 years.

I am Ila Mamatta's fiance.

¹⁴³ R2, p 63.

¹⁴⁴ Transcript, p 72, lines 1-2.

¹⁴⁵ R2, p 63.

We are in a civil partnership and registered our relationship on 8 April 2021 in Brisbane.

I confirm that I am in a genuine and continuing relationship with Ila and am engaged with him.

Our relationship has grown to a level where we cannot imagine living without each other and we are planning for our wedding and future in Australia in 2023.

We intend to unite in Australia and start our family together. I'm looking forward to the day we get married at Ocean View Estates. We are booked in for the 29 July 2023. It was earlier however we pushed the date back due to his Visa status and can just hope that we don't have to push it back again as plenty of planning has gone into it.

Since Ila was deported back to Port Moresby, Papua New Guinea in March 2022, I have spent 54 days with him. I flew there during the school holidays and my children spent time in Melbourne with their Grandparents. When I first got there my heart was full again. It was so incredible to see and hug him.

In April 2022 and in June 2022, I travelled to Papua New Guinea to see Ila.

I also saw Ila recently in September. During my visits to see him, we have been to the markets, museums, and restaurants together. We enjoy going shopping and cooking together. We meal prepped for when I left so he had food ready for his working days. We also snorkelled and hiked, went for walks on the beach, had backyard fires and bbq's and worked on our clothing and photography business. It was all a dream come true for me.

...

Because Ila and I have planned to marry and start a family in Australia, I have sponsored Ila's offshore Partner visa application lodged on 15 September 2022.

...

Apart from this, Ila has helped me greatly in contributing to rent, gas bills, phone bills, electricity bills and food. I have never asked or expected this help, but he has been generous on his own terms. Not because he wants something but because he is genuinely a considerate and loving person at heart.

...

We are committed to each other and we are close with our respective family members. We are planning to marry in 2023 and have shared the news of our engagement with friends and family.

Ila and I made long-term plans for our future in Australia after getting married.

I, therefore, state that Ila and I are in a genuine and continuing de facto relationship and have mutual commitments to a shared life as de facto partners to the exclusion of all others.¹⁴⁶

223. There is convincing written and oral evidence before the Tribunal demonstrating (1) the civil partnership between the Applicant and Ms David; (2) registration of that civil partnership; (3) their proposed wedding and reception at the stated venue; (4) the

¹⁴⁶ A3, pp 1-2, paras [1]-[9], [12], [15], [18]-[20].

connection (to an extent) between the Applicant and Ms David's two children; (5) her travel to PNG; and (6) the extent of the material support she receives from the Applicant's family, and to an extent, from the Applicant. I am therefore satisfied that Ms David is a member of the Applicant's immediate family for present purposes.

224. In her written statement, the Applicant's mother does not expressly talk about the impact on her in the event of the Applicant's removal to PNG. She was not called to give oral evidence. In her written statement before the Tribunal she says the following:

*'I know Ila Junior Mamatta is a totally changed person. He will be no harm to his current partner Miss Laura Davis and her two daughters [Child AR] (five years old) and [Child AV](one year old). Ila loves kids and having these two is a blessing to him and our family. Ila is not a threat to the community or the country. Our family does not condone or defend any of his unlawful behaviour toward [victims name redacted]. Our family pass our deepest sympathy for any pain our son has caused her in any way. We hope and pray that she will remain well and stay in God's grace and blessing. I plead you to allow Ila Juniour Mamatta to stay in Australia to finish his studies and remain with his civil partner Miss Davis and her two daughters. I know Ila is a changed person, I only ask that he be granted a second chance.'*¹⁴⁷

225. It is clear from both the oral and written evidence of Ms David that she would be impacted by the Applicant's continued absence from Australia in PNG and/or his continued inability to return to Australia. presence in PNG. At the Hearing I inquired whether relocation of Ms David and her two children to PNG was a feasible proposition. She responded thus:

'SENIOR MEMBER: All right, just one question from me. Let's just say this doesn't go well for your partner and he is compelled, I suppose, to stay in Papua New Guinea, have you given thought to relocating there with the children? Because we have heard that you have travelled there?

MS DAVID: Yes, I have been there three times this year and in December I will go again with the girls - - -

SENIOR MEMBER: Why?

MS DAVID: Well, because I am committed to the relationship and I love him - - -

SENIOR MEMBER: Well, think about the question. If you are going to go back in December - what, to see his family with the girls because is it fair to say that you are now well-known to them?

MS DAVID: Yes, definitely.

SENIOR MEMBER: You are going there in December - next month - to visit his family with your children?

MS DAVID: Yes.

¹⁴⁷ R2, p 179.

SENIOR MEMBER: Because you consider that you have a close relationship with his family?

MS DAVID: Yes, very. I would love them to meet the girls and for Ila to spend quality time with them for three weeks, but I could not relocate them permanently. I don't think it is right for them; they deserve to be here in Australia - - -

SENIOR MEMBER: Would there be an objection from their father?

*MS DAVID: Yes, absolutely. It wouldn't be okay, but if he is not allowed back then we will be devastated; I don't know how we are going to cope.*¹⁴⁸

226. Having regard to the evidence of the Applicant's mother and Ms David, I am safely led to the view (and finding) that the strength, nature and duration of the Applicant's ties to these two immediate family members in Australia carries a moderate level of weight in favour of setting aside the decision under review. I make this finding conditional on the presumption that both the Applicant's mother and Ms David are Australian citizens, Australians permanent residents, or people who have a right to remain in Australia indefinitely.

ii. Strength, nature, and duration of "other ties" – length of residence

227. There are two necessary enquiries referable to the extent of the Applicant's 'other ties' to Australia. The first of those involves the question of how long he has resided in Australia, including whether he came here as a young child. As mentioned earlier, the Applicant first came to Australia in 2007 and then resided here on a more or less permanent basis from 2013 until his voluntary departure in March 2022. It can be found that he has spent something like 11-12 years of his life in Australia. It can be safely found that the Applicant has spent a long period of his life in this country.
228. I will now make reference to the two tempering sub-elements in paragraph 9.4.1(2)(a) of the Direction. The first of those compels me to allocate less weight if the Applicant began offending soon after arriving here. I have found that he commenced residing in Australia on a more or less permanent basis in 2013. His first conviction in an Australian court occurred in September 2019 for an offence he committed in December 2018. A period of 5-6 years post-arrival should not be construed as being 'soon after arriving in Australia'. The first of these two tempering sub-elements should be put to one side and rendered neutral.

¹⁴⁸ Transcript, p 43, lines 5-29.

229. The second of the two tempering sub-elements at 9.4.1(2)(a) of the Direction compels an assessment of the extent of the Applicant's positive contributions to the Australian community. As I have mentioned earlier, in his PCF there is no reference the Applicant having engaged in remunerative employment.¹⁴⁹ The PCF contains scant reference to community contributions.¹⁵⁰ He has spent much of his time in Australia as a student. I am mindful of Dr Minge's comments about the Applicant's work in Australia to this effect:

*'Mr Mamatta said that his paid employment has chiefly been for his father's engineering company. He said that he began working for the company in 2015 (age 17 to 18 years). He took a break to work as a bartender in 2016 for about seven months because he was studying hospitality in year 12 and needed to obtain his Responsible Service of Alcohol Certificate. He returned to work for the family business as a soil technician in 2017 until his incarceration in late 2020. He described himself as a hard worker and denied any concerns being raised about his work performance.'*¹⁵¹

230. The Applicant can, therefore, demonstrate a certain level of participation in remunerative employment here and thus has made some measure of a contribution towards this country's coffers from which the Australian community is sustained. This second tempering sub-element moderately militates in the Applicant's favour pursuant to this Other Consideration (d) for the setting aside the decision under review.
231. Only the second of the two tempering sub-elements assists the Applicant and it confers a moderate but not determinative, level of weight in the Applicant's favour.

iii. Strength, nature, and duration of "other ties" – family and other social links

232. The Applicant's PCF is silent about any other ties he may have to Australia via extended family or other social links. I sought to clarify this issue with the Applicant's representative during closing submissions. There followed an exchange between me and the Applicant's representative which resulted in some level of uncertainty about any such ties the Applicant may have. I granted a requested adjournment so that the Applicant's representative could provide the Tribunal with a list of such 'other ties' the Applicant may have to this country.¹⁵²

¹⁴⁹ R2, p 65.

¹⁵⁰ Ibid, p 66.

¹⁵¹ R2, p 210.

¹⁵² As will be noted from the Transcript (see generally p 73, lines 7-46; p 74, lines 1-46; p 75, lines 1-31) it was open to the Respondent to object to the receipt of any such list so late in the proceeding. The Tribunal is obliged and thankful for the approach of the Respondent's representative in agreeing to the adjournment and

233. When the matter resumed, the Tribunal was provided with the following list of people possibly comprising '*other ties*'.¹⁵³ It should be noted that in addition to the below dot-pointed people to which the Tribunal was referred in closing submissions, the statements of other people who know the Applicant also appear in the material. It seems the below dot-pointed people to whom the Tribunal was referred are based in Australia¹⁵⁴ while the remaining statement-makers whose statements appear in the material are not.

234. I will go through each of the names provided to the Tribunal when the matter resumed:

_____ Chaplain John Kewa: whose statement appears in the material and is dated 1 November 2020.¹⁵⁵ The Chaplain has known the Applicant since about 2007. He was shocked to learn of the Applicant's offending in Australia and thought it was out of character for the Applicant. He says that he speaks with the Applicant '*at least once a fortnight*'. It should be noted that this statement was provided in November 2020 and was intended for use at the Applicant's sentencing hearing. It has nothing to say about how Mr Kewa would be impacted by the Applicant's removal. Mr Kewa was not called to give evidence at the Hearing;

_____ Aunty Mary Belle: there is no statement from this person before the Tribunal;

_____ The children of Aunty Mary Belle: there are no statements from those children before the Tribunal;

_____ Robert Abernethy: his report appears in the material and is undated.¹⁵⁶ Mr Abernethy says he has known the Applicant for 10 years and is in disbelief about the nature of his convictions. He regards the Applicant as a very kind hearted person with a willingness to help others. He is of the view that '*if there is any chance Ila can remain in Australia, I believe it will not be regretted. Ila is truly a gentle, kind and humble young man who deserves to be here in Australia*'.¹⁵⁷ Mr Abernethy's statement has nothing to say about how he would be impacted by the Applicant's removal. Mr Abernethy was not called to give evidence at the Hearing;

the provision of the subject list from the Bar table.

¹⁵³ See Transcript, p 75, lines 41-47; p 76, lines 1-47, p 77, lines 1-46; p 78, lines 1-22.

¹⁵⁴ With the exception of below-mentioned 'oshua Ban'

¹⁵⁵ R2, p 94.

¹⁵⁶ R2, p 197.

¹⁵⁷ Ibid.

Jim (James) Abernethy: the Tribunal was told there was no statement from this person.¹⁵⁸ I think this is incorrect. There is a two page statement in the material from '*James Abernethy*' made on 9 November 2021.¹⁵⁹ He has known the Applicant for about 10 years and is aware of the Applicant's very serious criminal conduct in Australia. He considers the Applicant has experienced contrition and that he '*...has learnt a terrible lesson*'. Mr Abernethy is aware of the Applicant's domestic relationship with Ms David and considers that he has been rehabilitated from the previous elements that caused him to very seriously offend. Mr Abernethy has career experience in law enforcement and judicial administration. He was not called to give evidence at the Hearing before me;

Aunty Rivo (wife of Jim/James Abernethy): there is no statement from this person before the Tribunal;

Mr Ian Smith is a geomorphological engineer based in Brisbane. He has known the Applicant's family since around 1990 and has enjoyed a continuous relationship between his firm and that of the Applicant's father since 2002. Mr Smith has provided certain instruction and education to the Applicant in the field of geotechnics. He says the firm/company of the Applicant's father is the leading company in PNG in the field of geotechnics. Mr Smith was not called to give oral evidence at the Hearing before me;

Peter Abernethy is currently employed as a public servant in the Queensland Government. He has provided an undated support letter for the Applicant, which appears in the material.¹⁶⁰ He has known the Applicant for over 10 years and was shocked to learn of his criminal offending. He says that he had '*never heard or seen Ila to be a violent person...*' he does not regard the Applicant as a violent or dishonest person and thinks he would be a '*valuable individual*' to the Australian community. He has nothing to say about how he would be adversely impacted by the Applicant's removal. He was not called to give evidence at the Hearing before me;

Joshua Ban describes himself as a '*cousin brother*' of the Applicant and says that he has personally known the Applicant for almost his entire life because they grew up together in PNG. Mr Ban's statement is dated 29 October 2021 and appears in

¹⁵⁸ Transcript, p 76, line 40.

¹⁵⁹ R2, pp 184-185.

¹⁶⁰ R2, p 239.

the material.¹⁶¹ Mr Ban speaks positively about the Applicant but has nothing to say about how he would be adversely impacted by his removal. He was not called to give evidence at the Hearing;

Gregory Leahy is a long term friend of the Applicant. His statement appears in the material and is dated 22 June 2021.¹⁶² Mr Leahy met the Applicant about 12 years ago when they both attended Indooroopilly State High School. He says '*I truly believe that Ila staying in Australia will be beneficial for the development and vision of the country.*'¹⁶³ He says that the Applicant loves Australia and that by being allowed to remain in Australia would allow him to make '*an impact on the country*'.¹⁶⁴ Mr Leahy's statement is otherwise silent about how he would be adversely affected by the Applicant's removal from Australia. He was not called to give evidence at the Hearing before me;

Mr Vijay Vekariya is a high school teacher working in the Queensland education system. His statement dated 19 June 2021 appears in the material.¹⁶⁵ He says that he has known the Applicant for something like 13 years because they both attended Indooroopilly State High School together where they jointly participated in many sporting and cultural events put on by the school. He talks about the Applicant's attributes '*...such as kindness, generosity, dedication and mateship...*'. He thinks the Applicant would '*...be a great citizen of this nation*'. His statement is otherwise silent on how he would be impacted in the event of the Applicant's removal. He was not called to give evidence in the Hearing before me;

Michele Carrett is the mother of Ms David. Her reference dated 10 November 2021 appears in the material.¹⁶⁶ She says '*I have spoken to Ila numerous times over the past year and he has come across as polite, caring and respectful young man. He has been open and honest with me.*'¹⁶⁷ While she speaks of the necessity for the Applicant to be in Australia as the de facto partner of her daughter, her statement has little to say about how she would personally be affected if he is not allowed to remain here. She was not called to give evidence at the Hearing before me.

¹⁶¹ R2, p 200.

¹⁶² R2, p 93.

¹⁶³ R2, p 93.

¹⁶⁴ Ibid.

¹⁶⁵ R2, p 95.

¹⁶⁶ R2, p 196.

¹⁶⁷ Ibid.

235. Having regard to the extent of the evidence around the Applicant's '*other ties*' to (1) extended family members; and (2) social links, I am of the view (and I find) that the strength, nature and duration of the Applicant's ties to these extended family members and social links carries a moderate level of weight in favour of setting aside the decision under review. This finding is conditional upon each of these above dot-pointed social links being Australia citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

(2) Impact on Australian business interests

236. Paragraph 9.4.2(3) compels an assessment of the Applicant's employment links to Australia with particular reference to any impact his removal may have on, "*Australian business interests*". I am of the view (and I find) that this component of Other Consideration (d) is not relevant.

Weight allocable to Other Consideration (d): links to the Australian community

237. With reference to the first part of this Other Consideration (d) (the strength, nature and duration of the Applicant's ties to Australia), I am of the view – after having analysed its three above referred elements – that the totality of the evidence points to the allocation of a *moderate, but not determinative*, level of weight in favour of the Applicant. The second part of this Other Consideration (impact on Australian business interests) is not relevant. Overall, the Applicant's links to the Australian community confers a *moderate, but not determinative*, level of weight in favour of setting aside the decision under review.

Findings: Other Considerations

238. The application of the Other Considerations in the present matter can be summarised as follows:
- (a) international non-refoulement obligations: *not relevant*;
 - (b) extent of impediments if removed: confers only a *slight, but not determinative* amount of weight in favour of setting aside the decision under review;
 - (c) impact on victims: *not relevant*; and

- (d) links to the Australian community: confers a *moderate, but not determinative*, level of weight in favour of setting aside the decision under review.

CONCLUSION

239. Under s 501CA(4)(b) of the Act, there are two alternate conditions precedent to the exercise of the discretion to revoke the mandatory cancellation of the Applicant's visa: either the Applicant must be found to pass the character test; or I must be satisfied that there is another reason, pursuant to the Direction, to revoke the cancellation. As noted above, the Applicant does not pass the character test.

240. In considering whether there is another reason to exercise the discretion afforded by s 501CA(4) of the Act to revoke the mandatory visa cancellation decision, I have had regard to the considerations referred to in the Direction. I find as follows:

Primary Consideration 1: confers a *very heavy* level of weight in favour of **affirming** the decision under review;

Primary Consideration 2: confers a *very heavy* level of weight in favour of **affirming** the decision under review;

Primary Consideration 3: confers a *moderate, but not determinative* level of weight in favour of **setting aside** the decision under review;

Primary Consideration 4: confers a *heavy* level of weight in favour of **affirming** the decision under review;

I have outlined the weight attributable to the Other Considerations. I am of the view (and I find) that the combined weights I have allocated to each of Primary Consideration 3 and Other Considerations (b) and (d), respectively, are not sufficient to outweigh the combined weight I have allocated to Primary Considerations 1, 2 and 4;

A holistic view of the evidence relevant to the Primary and Other Considerations in the Direction therefore favours affirmation of the Respondent's decision under review made on 11 October 2021.

DECISION

241. Pursuant to section 43(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **affirms** the decision made by the delegate of the Respondent, dated 11 October 2021 not to revoke the mandatory cancellation of the Applicant's Class TU Subclass 500 Student visa.

*I certify that the preceding 228
(two hundred and twenty-eight)
paragraphs are a true copy of the
reasons for the decision herein of
Senior Member Theodore
Tavoularis*

.....[SGD].....

Associate

Dated: 10 February 2023

Date(s) of hearing:	17 November 2022
Counsel for the Applicant:	Arron Hartnett
Solicitor for the Applicant:	Nilesh Nadan MyVisa (Immigration Law Advisory)
Counsel for the Respondent:	James Byrnes
Solicitor for the Respondent:	Chris West Sparke Helmore Lawyers

ANNEXURE A

EXHIBIT	DESCRIPTION OF EVIDENCE	DATE OF DOCUMENT	DATE RECEIVED
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R1	Section 501 G Documents (bookmarked G1- G28, paged 1 – 164)	Various	31 August 2022 ¹⁶⁸
R2	Respondent's Remittal Bundle (bookmarked 1-46, paged 1-810)	Various	31 August 2022
A1	Applicant's Statement of Facts, Issues and Contentions	28 September 2022	28 September 2022
R3	Respondent's Statement of Facts, Issues and Contentions (paged 1- 23)	24 October 2022	24 October 2022
A2	Applicant's Statement	14 November 2022	14 November 2022
A3	Ms Lauren David's Statement	14 November 2022	14 November 2022
A4	Report by Department of Foreign Affairs and Trade on Papua New Guinea	6 September 2022	14 November 2022
A5	Further submissions by the Applicant (paged 1-4)	Undated	14 November 2022

¹⁶⁸ See Transcript, p 45, lines 18-26 as to the basis of why this Exhibit R1 was deleted from the Exhibit List.